146 US 252

RECORD, CASE No. 13,569.

824

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 369. 45

LIPPMAN TOPLITZ AND HERMAN SCHWARZ,
PLAINTIFFS IN ERROR,

vs.

EDWARD L. HEDDEN, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JUNE 8, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 16, 1892.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of U. S. Circuit Court, South. Dist. New York.]

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Lippman Toplitz and Herman Schwarz, plaintiffs, and Edward L. Hedden, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and eighty-nine, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 20th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN A. SHIELDS, *Clerk.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE.

2 [Endorsed:] E. & A. A. 796. No. 11093. U. S. Supreme Court. Lippman Toplitz *et al.*, plaintiffs in error, against Edward L. Hedden, defendant in error. Writ of error. Charles Curie, attorney for plaintiffs in error. Due service of a copy of the within writ of error is hereby admitted this 20th day of November, 1888. Stephen A. Walker, P., attorney for defendant in error. [Stamped:] U. S. circuit court. Filed Nov. 20, 1888. John A. Shields, clerk. 1.45, ch'd.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three to fifty, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Lippman

Toplitz and Herman Schwarz, plaintiffs in error, against Edward L. Hedden, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this seventh day of June, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

3 Superior Court of the City of New York.

LIPPMAN TOPLITZ, HERMAN SCHWARZ, Plaintiffs,
against
EDWARD L. HEDDEN, Defendant.
} Summons. No. 2.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York, July 1st, 1886.

CHAS. CURIE,
Plaintiffs' Attorney,
Office, No. 44 Exchange Place, New York City.

(Endorsed:) 11093. No. 2. N. Y. superior court. Lippman Toplitz *et al.*, plaintiffs, against Edward L. Hedden, defendant. Summons. Chas. Curie, plaintiffs' attorney, 44 Exchange place, New York city. U. S. attorney's office. Received July 3, 1886. Due service hereof admitted this 1st day of July. Received, U. S. attorney's office, Jul- 3, 1886.

4 The President of the United States of America to the judges of the superior court of the city of New York, Greeting:

We for certain reasons being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against Edward L. Hedden, defendant, by Lippman Toplitz & ano., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 19 day of July, 1886, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

[L. S.]

Witness Hon. Morrison R. Waite, Esquire, Chief Justice of the Supreme Court of the United States, the 15 day of July, in the year one thousand eight hundred and eighty-six.

TIMOTHY GRIFFITH, *Clerk.*

STEPHEN A. WALKER,
United States Attorney, Attorney for Defendant.

5 [Endorsed:] 11093. U. S. circuit court. L. Toplitz & ano. *vs. Daniel Magone.* Copy certiorari. Stephen A. Walker, U. S. attorney, attorney for defendant. Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York. New York, —— —, 1886. Yours, Stephen A. Walker, U. S. attorney, attorney for defendant. To C. C., plaintiffs' attorney. Due service of a copy of the within and of the above notice is hereby admitted. New York, July 15, 1886. Chas. Curie, plaintiffs' attorney.

Bill of Particulars.

Name of importer, L. Toplitz & Co.

		Description of goods.	Whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty illegally exacted.	Date of payment of duties in excess.	Protest filed.	Date of appeal to Secretary of the Treasury.	Date of Secretary's decision.	
	1	Hats, bonnets, & hoods for men, women, & children.	Glasgow	Ethiopia	1885. July 2	1885. July 15	543 20	1885. July 15	1885. Aug. 19	1885. Aug. 19	1886. Ap'l 13	
	2	Do.	"									
	3	Do.	"	Anchoria	June 18	" 2	291 60	" 2	" 19	" 19	" 13	
	4	Do.	"	Furnessia	July —	" 20	492 10	Aug. 20	" 26	" 26	June 17	July 31,'85
	5	Do.	"	Anchoria	" 23	Aug. 5	297 20	Oct. 16	Sept. 11	Sept. 11	" 17	Oct. 2,'85
	6	Do.	"	Anchoria	" 23	" 5	251 90	Aug. 5	Oct. 14	Oct. 14	Ap'l 13	
	7	Do.	"	S. of Georgia	Aug. 21	Sept. 2	216 46	Oct. 10	" 14	" 14	" 13	Oct. 9,'85
	8	Do.	"	Ethiopia	" 6	Aug. 18	374 89	" 9	" 19	" 19	" 19	Sept. 15,'85
	9	Do.	"	"	" 6	" 18	285 12	Aug. 18	" 19	" 19	" 19	
	10	Do.	"	S. of Nevada	Sept. 11	Sept. 26	176 00	Sept. 26,'86	" 19	" 19	" 19	Sept. 25,'86
	11	Do.	"	Furnessia	Aug. 13	Aug. 24	314 72	Aug. 24	Nov. 21	Nov. 21	No ans. rec'd.	
117	12	Do.	"	S. of Georgia	" 21	Sept. 2	210 31	Sept. 2	" 25	" 25	"	
	13	Do.	"	Circassia	" —	" 16	861 40	" 16	Dec. 7	De. 7	"	
	14	Do.	"	S. of Nebraska	Oct. 30	Nov. 14	145 70	Nov. 14	" 7	" 7	"	
	15	Do.	"	S. of Nevada	Sept. 11	Sept. 26	260 72	Sept. 26	" 24	" 24	"	
				"	Nov. 20	Dec. 2	135 30	Dec. 2	" 31	" 31	"	Dec. 11,'85
	16	Do.	"						1886.	1886.		
	17	Do.	"	S. of Indiana	Oct. 2	Oct. 13	306 45	Oct. 13	Jan'y 16	Jan'y 16	"	
	18	Do.	"	Circassia	Dec. 17	Dec. 30	119 26	Dec. 30	" 16	" 16	"	
	19	Do.	"	S. of Georgia	Sept. 25	Oct. 8	291 98	Oct. 8	" 16	" 16	"	
	20	Do.	"	Furnessia	Oct. 22	Nov. 4	116 23	Nov. 4	" 25	" 25	"	
	21	Do.	"	S. of Georgia	Nov. 5	" 19	253 64	" 20	Feb. 1	Feb. 1	"	
	22	Do.	"	Ethiopia	Oct. 15	Oct. 26	264 32	Oct. 26	" 12	" 12-15	"	
	23	Do.	"	Furnessia	Sept. 17	Sept. 29	195 50	Sept. 29	" 12	" 12-15	"	
	24	Do.	"	S. of Nevada	Nov. 20	Dec. 3	268 58	Dec. 3	" 20	" 20	"	
			"	S. of Georgia	Dec. 10	" 24	243 48	" 24	M'ch 2	M'ch 2	"	

7 [Endorsed:] 11093. U. S. circuit court, southern district of New York. Lippman Toplitz & *als.* against Edward L. Hedden. Bill of particulars. New York, July 27, 1886. To Stephen A. Walker, Esquire, defendant's attorney. Sir: Please to take notice that this action is brought to recover duties illegally exacted by the defendant, as collector of customs at the port of New York, and the within is the plaintiffs' bill of particulars. Chas. Curie, plaintiffs' attorney, 44 Exchange place, New York city. A copy of the within paper has been this day received at this office. Stephen A. Walker, U. S. attorney.

8 Circuit Court of the United States for the Southern District of New York.

LIPPMAN TOPLITZ, HERMAN SCHWARZ, Plaintiffs,
against
EDWARD L. HEDDEN, Defendant.
} Complaint.

Plaintiffs complain—

1st. That defendant was, during the time hereafter named, the collector of customs of the United States at the port of New York.

2d. That plaintiffs were during said times partners in trade under the firm name of L. Toplitz & Co., and as such duly imported and entered at the port of New York the goods described in the bill of particulars annexed.

3d. The defendant, as such collector, exacted from plaintiffs as and for duties thereon and plaintiffs, in order to obtain said goods, were compelled to pay and did pay the sum of six thousand eight hundred & ninety-six & $\frac{6}{100}$ dollars in excess of the amount required by law.

4th. That plaintiffs filed with said defendant due and timely protests in writing upon each entry of said goods against his decision exacting such duty, setting forth distinctly and specifically the grounds of objection thereto, and also as above stated.

9 5th. That plaintiffs made due and timely appeals in each case to the Secretary of the Treasury, who has affirmed the decision of defendant as to certain of said entries, and as to the rest of said entries has neglected to answer said appeals, and more than ninety days had elapsed since said unanswered appeals when this action was commenced.

6th. That the bill of particulars hereto annexed states for each importation separately the date of entry at the custom-house, of the payment of duty in excess, of the filing of the said protests, of the appeal to the Secretary of the Treasury and of his decision thereon, together with the other particulars required by law, and is made a part hereof.

7th. That said sum so exacted as aforesaid has never been repaid to plaintiffs and is still due and owing to them.

Wherefore plaintiffs demand judgment against defendant for six thousand eight hundred & ninety-six & $\frac{6}{100}$ dollars, with interest on the several sums named in the bill of particulars from the several dates of payment as appear thereby, together with the costs and disbursements of this action.

CHAS. CURIE,
Attorney for Plaintiffs.

(Endorsed:) 11093. U. S. circuit court. Lippman Toplitz & *al.*, plaintiffs, against Edward L. Hedden, defendant. Complaint.
10 Chas. Curie, plaintiffs' attorney, 44 Exchange place, New York city. U. S. attorney's office. Received July 27, 1886.

11 Circuit Court of the United States for the Southern District of New York.

LIPPMAN TOPLITZ & *als.*
versus
EDWARD L. HEDDEN, Collector, etc.

The defendant answers to the bill of complaint as follows:

I. He denies that the true duty or that the true and lawful rate of duty on the goods referred to in the complaint was as stated in the complaint, and he denies that the plaintiffs were compelled to pay or did pay defendant, as collector or otherwise, the sum stated in the complaint or any sum in excess of the amount required by law as duties upon the said goods, or that any sum of money unauthorized by law was exacted as duties on said goods or otherwise.

II. He denies that the plaintiffs filed any protest or protests in writing in which the grounds of objections to the exaction of duties on said goods were distinctly and specifically stated.

III. He denies that the sum stated in the complaint or any sum is now due and owing the plaintiffs.

IV. He denies that he has any knowledge or information sufficient to form a belief as to whether the goods alleged in the complaint to have been imported at the times therein mentioned
12 were in fact such goods as are described in the said complaint.

V. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were demanded of plaintiffs and were by plaintiffs voluntarily paid to him in his capacity as collector of customs as and for duties due the United States on imported merchandise, and were forthwith, before the commencement of this action and before the receipt by defendant of any protest or objection on the part of the plaintiffs, paid over by the defendant in his official capacity aforesaid to the United States and placed beyond his control.

VI. And, further answering, defendant alleges that all moneys received by him from the plaintiffs in respect of the importations in the complaint alleged to have been made were sums due from plaintiffs to the United States as duties according to the rate of duty imposed by law upon articles of merchandise imported by plaintiffs and assessed with duty, and no other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiffs' entry thereof were collected or received by defendant from the plaintiffs.

Wherefore defendant demands judgment that the complaint be dismissed with costs.

STEPHEN A. WALKER
United States Attorney, Attorney for the Defendant.

13 (Endorsed:) 11093. U. S. circuit court, southern district of New York. Lippman Toplitz & *als. vs.* Edward L. Hedden, collector, etc. Answer. Stephen A. Walker, United States Attorney, Attorney for the Defendant.

Duties, &c., is brought to recover. Ch... bill of particulars. Ch... at this office. Stephen A. Walker.

attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, August 17th, 1886. Chas. Curie, plaintiffs' attorney. To C. C.

14 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Tuesday, the 10th day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable E. Henry Lacombe, circuit judge.

LIPPMAN TOPLITZ *et al.*
vs.
EDWARD L. HEDDEN. } 11093.

Now comes the plaintiffs, by Wm. Stanley, Esq., his attorney, and moves the trial of this cause. Likewise comes the defendant, by Wm. W. Smith, Esq., ass't U. S. attorney, his attorney. Thereupon a jury is empanelled and the cause proceeds to trial. After hearing the evidence of the parties and the arguments of counsel on Thursday, January 12, 1888, the court directs the jury to find a verdict for the defendant; thereupon the jury render a verdict whereby they find for the defendant.

It is ordered that the plaintiffs have a stay of proceedings on said verdict for sixty days.

JOHN A. SHIELDS, *Clerk.*

15 United States Circuit Court, Southern District of New York.

LIPPMAN TOPLITZ & *al.*
vs.
EDWARD L. HEDDEN. } 11093. Judgment, 188–.

The issues in this action having been brought on for trial before Mr. Judge Lacombe and a jury, at a circuit court of the October term, 1887, and the issues having been tried and a verdict for the defendant having been duly rendered on the 10th day of January, 1888, and his costs having been adjusted at $48.85:

Now, on motion of Stephen A. Walker, United States attorney, for fendant—

t is adjudged that the defendant have judgment against the intiffs upon the issues in this action, and that he recover the sum 48.85, his taxed costs, and have execution therefor.

gment signed this 17 day of Nov., 1888.

JOHN A. SHIELDS, *Clerk.*

(End

10 [Endorsed:] 11093. United States circuit court. Lippman Toplitz & *als. vs.* Edward L. Hedden. Judgment-roll. A. Walker, United States attorney, attorney for defendant. — —, 188–. Costs, $48.85. U. S. circuit court. Filed 1888, 12 m. John A. Shields, clerk.

17 U. S. Circuit Court, Southern District of New York.

LIPPMAN TOPLITZ and HERMAN SCHWARZ
against
EDWARD L. HEDDEN.
} Bill of Exceptions.

This cause came on for trial before his honor Mr. Justice Lacombe and a jury at a circuit court held at the city of New York on the 10th day of January, 1887.

The plaintiffs' counsel, to sustain the issues on his part, read in evidence twenty-four invoices, dated in 1885, headed as follows: "Invoice of Scotch bonnets, per steamship ——, for entry at New York, sold to Messrs. L. Toplitz & Co. by Alexander & Smith, of Stewartton, Scotland," and the like manner of entries thereon at the custom-house, in some of which the goods were described as worsted knit bonnets and in others as worsted caps, and the like number of protests, in each of which the following is the substance:

NEW YORK, *Oct.* 14, 1885.

Hon. Edward L. Hedden, collector of customs, New York.

SIR: We hereby protest against your decision and assessment of duties as made by you and the payment of more than 30% ad val. on our importations below mentioned, consisting of certain bonnets and hoods of hair, wool, or worsted or other material and not especially enumerated or provided for, claiming that under existing laws, and particularly by Sch. "N," act M'ch 3, '83, said goods are liable at no more than 30% ad val., and not at 24c. & 35%, 35c. & 40%, or 40c. & 35%, or as charged by you; and we give notice that we pay all other higher rates than is claimed above as the legal rate under compulsion and to obtain possession of our goods; and

18 we also give notice that we do not intend by this protest to relinquish or waive any right we may have to a refund of the difference between the duty exacted of us and any less duty which may hereafter be adjudged the legal duty upon said goods, intending this protest to be made against the present duty charged upon said goods, claiming that said duty is not the legal duty to which said goods are chargeable, holding you and the Government responsible for all excess of duty exacted by you upon said goods above the legal duty, and protesting against all illegal exactions of duty thereon, and hereby give notice that we intend this protest to apply to all future similar importations by us, and also intend the duplicate protest herewith submitted for transmission by you to the Secretary of the Treasury under the rules of your office to be an appeal to him from your decision and to likewise apply — all future similar importations by us.

Per S. S. Anchoria, fr. Glasgow, Aug. 5, 1885. 96217.

Per S. S. St. o- Georgia, fr. Glasgow, Sept. 2. Bond, 24214. 109,640.

CHAS. CURIE,
Attorney, 44 Exchange Place, N. Y.,
For L. TOPLITZ & CO.

(Endorsed:) 16899. L. Toplitz & Co. Anchoria. Bonnets & hoods. Custom-house, New York. Oct. 14, 1885, received. E. H. L. Jan. 10, 1888. Exhibit 5 P.

Plaintiffs proved that the goods therein referred to were imported by the plaintiffs about the dates of said entries, and that the defendant exacted a duty thereon of thirty-five cents a pound and thirty-five per cent. ad valorem under Schedule K of section 2502 of the act of March 3, 1883, as knit goods made on knitting frames; that the dates at which said invoices were made and dated and the said entries were entered at the custom-house and the duties were exacted and paid and the said protests were duly filed and appeals were taken to the Secretary of the Treasury and at which the Secretary decided thereon and omitted to decide are all set forth in the bill of particulars, a copy of which is a part of the judgment-roll.

19 That plaintiffs paid the duties before obtaining possession and in order to obtain the goods and brought this suit in due time to recover back the amounts claimed to have been illegally exacted.

The plaintiffs claimed that the said goods were dutiable at thirty per cent. ad valorem under Schedule N of section 2502 of the act of March 3, 1883, as "bonnets for men," and called as a witness—

LIPPMAN TOPLITZ, who, having been duly affirmed, testified that he was one of plaintiffs and a member of the firm of Toplitz & Co., of New York, and that his business was that of importer of Scotch caps and other goods.

That the invoices and entries produced were the invoices and entries of his firm, and that the goods referred to in them were imported from Scotland, where they were manufactured; that the samples produced were samples of the importations in question, and that the articles so produced were Scotch bonnets.

Being cross-examined, the witness testified that he had been in his present business over thirty years and had been importing the articles in controversy since 1863; that they are pretty much all imported from Scotland; that they were known in this country as Scotch bonnets and sold as such; that people who bought them from him asked for them by the name of Scotch bonnets most of the time. Once in awhile a man comes along and asks for Scotch caps, but that they were more frequently called bonnets than caps.

That he had one other suit against the Government than
20 the one on trial under the old tariff; that he did not know whether it was tried. There was no trial in that suit.

Was the claim — that these goods are caps made on frames?

Plaintiffs' counsel objected on the ground that the record was the best evidence of the claim. The court overruled the objection and plaintiffs' counsel duly excepted.

The witness answered: Yes; I think that is it. Similar goods were concerned in that. The witness further testified that the caps

in the suit on trial were made of wool knitted on frames and shrunk and then blocked.

Q. Now, Mr. Toplitz, do you remember that in the summer of 1882, when a bill was pending before Congress to amend the statutes by excluding wool goods from the provision for caps and other articles made on frames, that your firm addressed a letter to the Hon. S. S. Cox, a member of Congress from this city, protesting against the passage of that law?

To this question plaintiffs' counsel objected as immaterial, and that the witness had no right to state the contents of the letter, and that the letter itself would be the best evidence.

The court overruled the objection and plaintiffs' counsel duly excepted.

The witness answered: They had correspondence to that effect—to some effect. I don't know what exactly. Our firm wrote a letter. I did not.

Q. Now, I show you what purports to be a copy of that
21 letter and ask you if it is a copy.

Objected to on the ground that the original was not produced. The objection was overruled and plaintiffs' counsel duly excepted.

Defendant's counsel then offered it in evidence. Plaintiffs' counsel objected. The court overruled the objection and plaintiffs' counsel duly excepted.

Defendant's counsel then read it in evidence as follows:

"JUNE 16, 1882.

"Hon. S. S. Cox, member of Congress, Washington.

"SIR: We take the liberty of inclosing you a copy of one of the letters which we sent to several newspapers here. As you will perceive from the contents of this letter, it refers to the additional duty which Mr. Kelley, of Pennsylvania, moved to have put on the woolen knitted goods. The supreme court has decided that the way the law reads now in reference to knitted goods there is no error, and, as there has been a commission appointed by Congress for the revision of the tariff, everything regarding the tariff should be left with that body. We are importers of woolen knitted caps, which is not an article of luxury, but a necessity; they are only worn by laboring men, and, up to the decision of the supreme court, we were compelled by the collector to pay from 90 to 120 per cent for these goods, which we can prove you by the following:

	We paid, in Europe, for some kinds of woolen caps,		
22	10s. sterling, equal to $2.43		$2 43
	Add to this a commission of 2½ per cent., on which we have also to pay duty, would make	$0 06	
Duty, 35 per cent.		88	
Weight, 3½ pounds, at 50 cents		1 75	
			2 69
			5 12

which will plainly show you that the duty on this article was over 100 per cent.

We are now paying duty, according to the decision of the supreme court, 35 per cent., which — in addition to shipping expenses, commissions, insurance, &c., which is also 15%; therefore a protection for the so-much-abused home manufacturers of 50 %; therefore not so bad as they appear to make it. There is a certain style of cap worn by the poorest laborers in the coal mines, but we cannot import these at the rate of duty formerly imposed upon it. The price of this cap is 6s. sterling, equal to $1.48, and, owing to the coarseness of the wool, they weigh 6 pounds to the dozen, and the duty would therefore be over 150 per cent., while fine goods, of light weight, manufactured of the finest quality of wool, and which could be considered a luxury, would be only 45 %. You will see from the above facts that if Congress should see fit to advance the tariff on this class of goods 50 per cent. it would be a great injustice.

We have no doubt you will use your influence in preventing as much as possible the passing of any bill for increase of duty. We think that importers have some rights, too, as they help to sustain the Government, while the so-much-abused home manufacturers only sustain their own pockets.

23

We remain, respectfully yours,

L. TOPLITZ & CO.,
New York.

I was not present when my partner, Mr. Schwarz, appeared before the tariff committee of 1883 and made a statement with regard to the duties on those articles. I know he did make a statement. It was made orally. He did not write it out.

On entry No. 6, shown me, the goods are entered as worsted knitted caps. In entry No. 10 they are entered as worsted knitted bonnets. In entry No. 12 they are entered as knitted caps; same in No. 5. In several of the entries the word bonnets is written over the word caps, but it was not done by me. The work is done by the brokers. These altered entries were signed by me, and I cannot tell whether the alterations were made before I signed them or afterwards.

These goods have been known as bonnets since I have dealt in them, for 30 years. Generally here, and on the other side more so.

The use of the term bonnet to designate articles such as these was more general in this country thirty years ago than to-day.

I have bought these goods for a long time.

Mr. Schwarz also bought them. I have bought them from a number of different manufacturers—bonnet manufacturers. Alexander & Smith, of Stewarton, Scotland—Ayrshire, I believe—furnished the most. I have been buying of them quite a number of years.

24

Most of the goods in this suit came from them, I think. I don't think the goods involved in the other suit of ours came from them. Our place of business is at No. 100 Greene street. Our sign is "Importers of Scotch caps."

Being re-examined, witness said:

I do not know any article other than those like these samples here, which are known in this country as bonnets for men. We were required to enter them at the custom-house as worsted knitted caps.

And being cross-examined, witness said:

That some of the entries were changed from "caps" to "bonnets." Frequently clerks will accept bonnets; at other times they will want to classify the goods and make up the duty on them, and I am compelled to be dictated to by them; otherwise, I could never get the goods out. I did not see the order, but heard of it; the clerks told me.

Q. Don't you know as a matter of fact that in more than half of the entries which have been presented to you to-day and which you have testified about that the goods were entered as worsted bonnets without the use of the word "caps" on them at all?

A. Well, it might have been one clerk; another one would not. One clerk would and another one would not.

Plaintiffs' counsel reads in evidence a paragraph from section 8 of the act of July 14, 1862, as follows:

"On bonnets, hats, and hoods for men, women, and children, composed of straw, chip, grass, palm leaf, willow, or any other vegetable substance, or of silk, hair, whalebone, or other material not otherwise provided for, forty per centum ad valorem."

Plaintiffs' counsel then read in evidence the definition of bonnet from Webster's Dictionary as follows:

"Bonnet—a cap or covering for the head in common use before the introduction of hats and still used by the Scotch. 'And plaids and bonnets waving high.'—Sir Walter Scott.
(2.) A covering for the head worn by females."

Also from Worcester's Dictionary, edition of 1887, and also from an edition of the same published in 1860:

"Bonnet—(1) a cap or hat worn by men. (Obsolete or antiquated.) 'I think he bought his doublet in Italy, his bonnet in Germany.'—Shakespeare.
(2.) A covering for the head worn by women."

Also from the Imperial Dictionary:

"Bonnet—(1) a covering for the head worn by men; a cap. 'Plaid- and bonnets waiving high.'—Sir Walter Scott.
(2.) A covering for the head worn by women and distinguished from a hat by certain small details, which vary endlessly according to the fashion."

Also from Stormonth's English Dictionary:

"A cap or covering for the head of man or woman; a covering for the head worn by women. In Scotland, a round worsted cap formerly much worn by men."

Also from Chambers' Encyclopedia, published in 1881 by the American Book Concern of New York, as follows:

"Bonnet—a covering for the head. The French, from whom we have the word, apply it as we do to male as well as female head-dress."

Also from the edition of Encyclopedia Britt*a*n-ica published by Scribner:

"A cap or bonnet without any peak, decorated with a spray of heather, was worn as a head covering, the bonnets of the chiefs being distinguished with the addition of eagle's feathers, and illustrations of the cap or bonnet are given."

"The male dress usually appropriated to dignified persons also consists of a close garment confined at the waist and furnished with tight and sometimes with loose sleeves, a robe or mantle with long hose, to which is often added a cap greatly resembling the Phrygian bonnet."

26 Also a quotation from "Monastery," by Walter Scott:

"March, march, Ettrick and Teviotdale!
Why the deil dinna ye march forward in order?
March, march, Eskdale and Liddesdale!
All the Blue Bonnets are bound for the border."

Also the following:

"England shall many a day
Tell of the bloody fray
When the Blue Bonnets came over the border."

Also from the following plays of Shakespeare (Merchant of Venice, As You Like It, King Richard II, King Henry V):

"NER.—What say you, then, to Faulconbridge, the young baron of England?

"POR.—You know I say nothing to him, for he understands not me nor I him. He hath neither Latin, French, nor Italian, and you will come into the court and swear that I have a poor pennyworth in the English. He is a proper man's picture; but alas! who can converse with a dumb show? How oddly he is suited! I think he bought his doublet in Italy, his round hose in France, his bonnet in Germany, and his behavior everywhere."—(Merchant of Venice.)

"A lean cheek, which you have not; a blue eye, and sunken, which you have not; an unquestionable spirit, which you have not; a beard neglected, which you have not; but I pardon you for that, for simply your having in beard is a younger brother's revenue. Then your hose should be ungarter'd, your bonnet unbanded, your sleeve unbuttoned, your shoe untied, and everything about you demonstrating a careless desolation."—(As You Like It.)

"What reverence he did throw away on slaves,
Wooing poor craftsmen with the craft of smiles
And patient underbearing of his fortune,
As 'twere to banish their affects with him.
Off goes his bonnet to an oyster wench."
—(King Richard II.)

"Give me any gage of thine and I will wear it in my bonnet; then if ever thou darest acknowledge it, I will make it my quarrel."—(King Henry V.)

Also from Book of Ezekiel:

"They shall have linen bonnets for their heads and shall have linen breeches upon their loins."

This under ordinances for the priests.

27 Plaintiffs' counsel then called as a witness DAVID PRINCE, who, having been duly sworn, testified as follows:

I have been an importer. I was with the house of L. J. Phillips, of this city. I manufactured articles like samples produced in Scotland. We call them there bonnets. I was importing these goods for about six years—from 1865 until 1872.

Plaintiffs' counsel then rested.

Defendant's counsel then called as a witness MARTIN MCGARVEY, who, having been duly sworn, testified as follows:

I reside at Utica, New York. I have been a brewer from six to eight years. I was in the business of manufacturing Scotch caps three and a half or four years—from 1883 to 1887. I was a Scotch-cap manufacturer on 1st of January, 1883; have manufactured such goods as samples, only better.

Q. Please state by what name on third of March, 1883, or immediately prior thereto these goods were known in trade and commerce.

To this question plaintiffs' counsel objected, 1st, on the ground that Congress did not in the enactment have reference to commercial designation, and, 2nd, as to the question of time, 1883 and some indefinite time. I think the time to which he refers should be more definitely stated. The court overruled the objection and plaintiffs' counsel duly excepted.

A. Scotch caps.

Q. Please state whether on 3rd of March, 1883, or immediately prior thereto these goods were known in trade and commerce as bonnets for men.

28

Objected to as immaterial and for same reason as before. Objection overruled. Exception.

A. No, sir.

Witness continued: These samples are made from carded wool knitted on frames.

Being cross-examined:

Q. Are they not made of worsted? Haven't they worsted in them?

A. I don't know what you mean by that. I don't know what worsted is. I don't know what you call worsted. There is no worsted used in those caps. As I understand, worsted is a coarser grade of goods than what those goods are manufactured from. There is no worsted in them, as I understand worsted. We call it yarn. I don't know whether there is such a thing as worsted yarn. This lining in the cap is of cotton. We buy that; the outside we manufacture. That is made of pure wool and shoddy without cotton.

Being re-examined by defendant's counsel, witness said:

I never dealt in bonnets or manufactured them.

Defendant's counsel then called as a witness PATRICK CORBETT, who, being duly sworn, testified as follows:

I have been in wholesale hat trade for about 25 years. I have dealt more or less in such articles as samples in this State.

Q. Are you able to state by what name such articles were commercially known and designated on 3rd of March, 1883, and immediately prior thereto.

29 To this question plaintiff's counsel objected as immaterial, and on the same grounds as above stated.

The court overruled the objection, and plaintiff's counsel duly excepted.

A. They were known as Scotch caps.

Q. Were they at that time known and designated as bonnets for men?

Same objection, ruling, and exception.

A. Not that I know of.

Being cross-examined, witness said:

I have been a dealer in hats and caps in this city. There is a large variety of caps in use besides those like these samples, made of other materials than wool, and some of wool. They are made of cloth, cassimeres, not all wool. There is a large variety made of cloths and of different styles from these samples and for use at different seasons of the year, some made of linen and some of cotton. I never heard of a Scotch bonnet, except here in this room; I don't know what bonnets are.

Defendant's counsel called as a witness ROBERT DUNLAP, who, having been duly sworn, testified as follows:

I am in the hat business at 174 5th avenue and 181 Broadway, and also in Philadelphia and Chicago; have been in that business about 30 years. We sell a large variety of head-gear. There may be some that I do not deal in. Whether we sell all varieties is a broad question. We also sell bonnets for women. I am familiar with samples in question—have dealt in them—and able to state how they were commercially known and designated in hat
30 trade in March 3, 1883, and immediately prior thereto. I have never known them to be called anything else but caps; have never sold them under any other name; have purchased them of L. Toplitz & Co.; at that time there were in use in trade and commerce in this country bonnets for women composed of chip, which is a sort of straw. I don't know about grass. We have a ladies' department in our retail store. I am not sure there were bonnets for women composed of palm leaf or of willow; there were of straw and hair; there were not of whalebone. On the 3rd of March, 1883, and immediately prior thereto, there was not any such term used in trade and commerce as bonnets for men.

Being cross-examined, witness said:

I have imported articles like samples in suit from Scotland. They are known there as bonnets. I have heard them at times in this country called by another name than Scotch caps by Scotchmen. I have heard them called by Scotchmen bonnets. In the store on 5th avenue Scotchmen would ask for the article by that name. We sell such goods as these in New York more particularly to the mechanic. Sometimes we sell them to Scotchmen, I suppose.

Defendant's counsel then called as a witness WILLIAM RUSSELL, who, having been duly sworn, testified as follows:

I reside in Vineland, New Jersey. I am a Scotch-cap manufacturer. I have manufactured both in this country and in Scotland. I have manufactured in this country since 1881. I was engaged in the manufacture and sale of them in 1883. I am familiar with goods like samples and with their commercial designation in this
31 country on the 3rd of March, 1883, and immediately prior thereto.

Q. Please state how such goods were known and designated in trade and commerce at that time in this country.

To this question plaintiffs' counsel objected as immaterial and on the same grounds heretofore. The court overruled the objection, and plaintiffs' counsel duly excepted.

A. Scotch caps. I am a Scotchman.

Q. Please state whether in the year 1883 and immediately prior to the 3rd of March you heard such goods as these designated in trade and commerce in this country as bonnets for men.

To this question plaintiffs' counsel objected as immaterial and on the same grounds as above stated. The court overruled the objection, and plaintiffs' counsel duly excepted.

A. No, sir; at that time I knew of no such article in trade and commerce in this country as bonnets for men.

Being cross-examined by plaintiffs' counsel, witness said:

If any one should come to me and ask me for a bonnet I should have an idea of what he meant. I would suppose he meant a cap. He would have to specify what kind. A bonnet don't designate any particular kind of cap at all in Scotland. It is a general term. It is not near so general this last 10 years as it was before that—not so common. 10 years ago it was only used amongst the common work people in Scotland. Then about the only thing in Scotland which was called a bonnet was a Tam O'Shanter—flat shape,
32 like a pan-cake. Goods like the samples are sold in this country largely to working men—to Americans as well as Scotchmen. I don't know of anything in trade and commerce called bonnets for me- in this country.

Being re-examined by defendant's counsel, witness said:

There has been no change in the commercial designation of these articles since the 3rd of March, 1883. No man has ever asked me for a bonnet in this country. I have never sold any article under that name. I sell to jobbers in the trade and to retailers.

Defendant's counsel then called as a witness CHARLES LOOMIS, who, having been duly sworn, testified as follows:

I am in the Scotch department of Hurlbut, Shethar & Sanford, of this city. I have been with them about six months. Prior to

that I was in the jobbing hat and cap business, and am somewhat familiar with goods like samples. They are known and designated in trade and commerce as Scotch caps. I don't know that I have ever known them designated as bonnets for men.

Being cross-examined, witness said:

I have never imported. Whether the house I am with import I could not swear of my own knowledge.

Defendant's counsel then rested.

Plaintiffs' counsel then read in evidence the definition of cap from Worcester's Dictionary as follows:
Cap.—A covering for the head; and from Webster's Dictionary as follows: A part of dress made to cover the head.

33 Plaintiffs' counsel then recalled DAVID PRINCE, who testified as follows:

I have imported articles like samples. I was in business prior to 1883, from 1866 to about 1870 or 1871.
Q. What was the designation in trade and commerce during the time you were engaged in it of articles like samples?
A. They were known sometimes as caps and sometimes as bonnets.

Being cross-examined, witness said:

They were more generally known as caps.

Plaintiffs' counsel then called as a witness JOSEPH HART, who, having been duly sworn, testified as follows:

Our house is a manufacturer of straw goods and a commission-house. I have imported articles like samples. We imported them about 1883. They were known in trade and commerce by importers and dealers in this country as Scotch caps and bonnets; by both names.

Being cross-examined, witness said:

I was in the business of importing Scotch caps about four years before 1883 and retired from it about 1884.

Plaintiffs' counsel then called as a witness HERMANN SCHWARTZ, who, having been duly sworn, testified as follows:

I am one of the plaintiffs; have imported since 1863. I think we import more than any other house. In March, 1883, and prior thereto these goods were known in this country as bonnets and caps, by some as bonnets and by some as caps, and have been so known as long as I have imported them—for 25 years.

34 Q. I hand you a sample of a tweed bonnet and a tweed cap.
A. Yes, sir. These articles are subjects of importation in this country. I know the duties which are levied on them.

Q. What are those duties?

To this question defendant's counsel objected as immaterial, incompetent, and irrelevant. The court sustained the objection, and plaintiffs' counsel duly excepted.

Being cross-examined, the witness stated:

I have had special charge of the Scotch-cap business since 1863. I remember when a commission was appointed to revise the tariff, in 1882, and that that commission held sessions in different parts of the country to listen to statements of importers and manufacturers. I appeared before the commission and made a statement. I cannot say whether the report produced is correct. I was not asked to sign anything, so as to read it over. I don't know whether they took exactly my words or not. I see a good deal in it that I did testify, but whether it is all I testified I cannot say; they may have left some words out; the main contents is what I stated; so far as it goes it is correct.

Defendant's counsel then offered to read some portion of the report to the jury.

Plaintiffs' counsel objected. The court overruled the objection, and plaintiffs' counsel excepted.

Defendant's counsel then read as follows:

35 "NEW YORK, *October* 5, 1882.

"Mr. H. Schwartz, representing the firm of L. Toplitz & Company, New York, importers of Scotch caps, addressed the commission as follows: I want to speak in regard to the tariff on worsted and knit goods. We are importers of worsted knitted caps, which are not a luxury and which are not even made here; but they are subject to a duty of one hundred per cent., in fact, and in regard to some of them, the coarse grades, the rate of duty is as high as one hundred and fifty per cent. They are classed as worsted and knitted goods. I have a report here which I made to Congress in regard to this matter, which I will read."

The- follows the letter which was admitted the other day.

"Is this article knitted? Yes, sir; it is knitted on a frame. Is that not done in this country? One party in Utica made some on a machine which came from the other side; he knitted some caps, but most of them are brought over here. What does that cap cost a dozen here now? About six dollars a dozen by the quantity, but they have to go through about four hands before they reach the wearer. By Commissioner McMahon: What recommendation do you make? I make the recommendation that if there is from thirty-five to forty per cent., in addition to about fifteen per cent. for expenses for commissions, insurance, cartage, freight, &c., it would be a sufficient protection. You recommend thirty-five or forty per cent., then, in lieu of the present duty? Yes, sir; but at any rate take away the pound."

36 Mr. STANLEY: What are you reading?

Mr. W. W. SMITH: I am reading such parts of it as I desire and pick out all the way through. (Continuing:) "That would be practically taking away the pound duty? Well, it was thirty-five per cent. until recently, when Congress changed the law. We brought a lawsuit against the Government, claiming that these articles ought not to pay more than thirty-five per cent. as specially provided for, and we won that suit. That is the knit-goods suit that I refer to. Now Congress has passed the law over again."

DEFENDANT'S COUNSEL:

Q. Well, now, Mr. Schwartz, I understood you to say on your direct examination that these goods had been known as bonnets in this country ever since you began to import them, in 1863.

A. I didn't state that. I said bonnets and caps. They were, at any rate, partially known as bonnets and so known at the time I brought the first suit, in which I claimed those articles were caps made on frames. I don't know whether I knew, at the time I appeared before the tariff commission, what the rate of duty was upon bonnets, hats, and hoods for men, women, and children. I don't remember. I testified that these goods were known in trade and commerce in this country as bonnets and caps. Most of them call them caps. I call them sometimes bonnets and sometimes caps. Buyers call them sometimes bonnets and sometimes caps—most generally caps.

The parties agreed that if the plaintiffs were entitled to recover the amount would be $7,191.97.

37 Both parties then rested.

Defendant's counsel made a motion that the jury be directed to find a verdict in favor of defendant.

Plaintiffs' counsel then moved that a verdict be directed for the plaintiff-, and if that motion should be denied, then the cause should be submitted to the jury.

The court denied the motion of the plaintiffs' counsel to direct a verdict for the plaintiff-, and the plaintiffs' counsel duly excepted.

Plaintiffs' counsel then asked the court to submit the case to the jury.

The court refused so to do, but offered to submit to the jury the sole question whether, at the time of the passage of the tariff act of March 3rd, 1883, the word bonnet had in this country a well-known technical commercial designation such as would cover goods of this kind.

Plaintiffs' counsel disclaimed any desire to go to the jury on that question alone, but asked leave of the court to go to the jury generally.

The court denies the motion, and plaintiffs' counsel duly excepted.

Thereupon the court directed a verdict for the defendant, and the plaintiffs' counsel duly excepted.

The court delivered the following opinion upon the motion:

The COURT: The articles in this case, which are made of wool, are knit on frames, are used for a covering for the head, and come from Scotland, and they have been assessed for duty by the
38 collector under paragraph 363 of the tariff act, which reads: "Flannels, blankets, hats of wool, knit goods, and all goods made on knitting frames, balmorals, woolen and worsted yarns," &c., &c.

It is claimed by the plaintiff that they are properly assessable under paragraph 400 as follows: "Bonnets, hats, and hoods for men, women, and children composed of chip, grass, palm leaf, willow, or straw or any other vegetable substance, hair, whalebone, or other material not specially enumerated or provided for in this act."

The words used in these tariff statutes when not technical, either as having a special sense by commercial usage or as having a scientific meaning different from the popular meaning—in other words, when they are words of common speech—their interpretation is within the judicial knowledge, and is therefore a matter of law.

The plaintiff contends that the word "bonnets" in this phrase, "bonnets, hats, and hoods for men, women, and children," or, as he further qualifies the words, "bonnets for men," is to be taken in its ordinary acceptation and not as a technical word or as a commercial term with some special meaning attached to it in the usages of trade and commerce. He further claims that such general, common, every-day meaning covers goods such as are the subject of this suit. They are what have been called Scotch caps; they are a head covenng in use in Scotland and imported from there to this country, and I infer that they had been, in their present shape, in use in Scotland for many years.

What, then, is the meaning of the word "bonnet"? What is its ordinary and received acceptation in the English lan-
39 guage as used in this country where Congress legislates? What is its popular and received import? What is its common, every-day meaning? Such, under the decisions, is the question which is to be answered.

Now, it needed not a reference to the quotations which were read here the day before yesterday to satisfy us all that heretofore, at the time when the Bible was translated, at the time when Shakspeare wrote his plays, at the time that Walter Scott wrote his novel, and to-day, even in novels, narratives, or poems descriptive of Scotch life, the word "bonnet" was used as meaning and including a cover for the head. It is in use in that sense, however, now. By now I mean March 3rd, 1883, and in this country; and, first, is it so in use now?

Several lexicons and cy-lopædias published in England and in Scotland have been referred to, but I suppose there is no better authority upon English language to-day, so far as it goes, for the first volume only is out, as is the English dictionary published under the auspices of the philological society and edited by Mr. Murray. That

dictionary, under the definition of "bonnet," describes it as a head dress of men and boys, usually soft, and distinguished from the hat by want of a brim; in England superseded in common use apparently before 1700 by a cap, but retained in Scotland; hence sometimes treated as equivalent to a Scotch cap." That seems to be the best English authority for the use of the term. But it is not its use in England which concerns us here. What is the meaning of the word "bonnet" in this country? What was its meaning on
40 March 3rd, 1883? The lexicons are, of course, the first authority to be consulted upon such a question; but I do not understand under the decisions that they are the sole foundation of authority and that the court in deciding the question is restricted to the precise definition used in any particular dictionary. Two dictionaries are recognized as the standards for this country—Webster and Worcester. The edition of Worcester which has been put in evidence gives the definition of a cap or hat worn by men, with a quotation from Shakspeare in illustration, coupled with a sign indicating that it was obsolete at the time that edition of the dictionary was published, which was in the year 1860. Webster's Dictionary, edition of 1865, does not contain any express statement that the word has become obsolete when used in that sense; but the phraseology of the first definition which it gives is such as not necessarily to be in conflict with the statement in Worcester. It is, "A cap or covering for the head in common use before the introduction of hats, and still used by the Scotch." Whether or not that particular paragraph means that the cap or covering was in common use or that the name or bonnet in that sense was in common use is not entirely clear, grammatically clear, upon the face of the paragraph. If there is no conflict between these two authorities, then the statement in Worcester may be taken as conclusive. If, however, there is conflict between them, then the court must determine this question from its own knowledge as to the use of the word.

41 Three witnesses, and I do not refer to their testimony as enlightening the court upon the meaning of the word, nor do I predicate my ruling upon their testimony, but I refer to it in illustration merely—three witnesses gave suggestive testimony upon this point. Mr. Dunlap sells a great many of these caps—imports and sells them, and buys them also, I presume, from manufacturers here. He sells them on the call of his customers as caps, except that Scotchmen have called and asked for a bonnet.

Mr. Russell, himself a Scotchman, knows what a bonnet is; but though he has been in business here long and sold many of them he testifies that no one here has asked for these goods, asking for them by the name of bonnet.

The other, a most important witness on that point, is the plaintiff himself. No one arriving in a strange city anywhere in this country, certainly no one where the knowledge of the court extends as to the language used by the people there, and intending to purchase a Scotch cap, looking over a business directory, would go to a person who advertised himself as a dealer in bonnets to purchase one.

The plaintiff seems to have recognized that fact fully, for upon his sign he describes himself as an importer of Scotch caps.

I am, therefore, of the opinion that the word "bonnet" is not in this statute sufficiently broad to cover the goods the subject of this suit unless it is made so by having affixed to it at the time Congress passed this act some peculiar, technical, trade meaning which coupled it in the minds of the legislators with these particular goods or goods similar to them.

42 And inasmuch as the matters aforesaid do not appear upon the record or otherwise than by this bill of exceptions plaintiffs' counsel has caused the same to be made and it was duly settled on the 14th day of November, 1888.

E. HENRY LACOMBE.

We consent to the settlement of the above.

CHAS. CURIE, Esq.,
Att'y for Pl'ffs.
STEPHEN A. WALKER,
U. S. Att'y, for Def't.
p. p. STANLEY, CLARKE & SMITH.

(Endorsed:) No. 11093. U. S. circuit court, southern dist. of New York. Lippman Toplitz and another *vs.* Edward L. Hedden. Bill *if* exceptions. Charles Curie, plaintiffs' attorney, 44 Exchange place, N. Y. city. U. S. circuit court. Filed Nov. 14, 1888. John A. Shields, clerk.

43 Supreme Court of the United States.

LIPPMAN TOPLITZ and HERMAN SCHWARZ, Plaintiffs in Error,
vs.
EDWARD L. HEDDEN, Defendant in Error.
} Assignment of Errors.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the said court, at the Capitol, in Washington, come the said plaintiffs in error, by Charles Curie, Esq., their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit: That by the record aforesaid it appears that the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiffs against the said defendant.

And the said plaintiffs pray that the judgment aforesaid for the error aforesaid and other errors in the record and proceedings aforesaid may be reversed, annulled, and altogether held for nothing, and that he (they), the said plaintiffs, may be restored to all things which he (they) has (have) lost by occasion of said judgment, &c.

CHARLES CURIE,
Attorney for Plaintiffs in Error.

44 [Endorsed:] 11093. United States Supreme Court. Lippman Toplitz and ano., plaintiffs in error, *vs.* Edward L. Hedden, defendant in error. Assignment of error. Charles Curie, attorney for plaintiffs in error. Service of a copy of the within assignment of error is hereby admitted this — day of November, 1888. Stephen A. Walker, C. S. R., attorney for def't in error. U. S. circuit court. Filed Nov. 21, 1888. John A. Shields, clerk.

45 Supreme Court of the United States.

LIPPMAN TOPLITZ and HERMAN SCHWARZ, Plaintiffs in Error, *vs.* EDWARD L. HEDDEN, Defendant in Error. } N. S. 11093. Joinder in Error.

And afterwards, to wit, on the second Monday of October, in said term, the said defendant in error, by Stephen A. Walker, his attorney, comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid given may be in all things affirmed, &c.

STEPHEN A. WALKER,
Attorney for Defendant in Error,
P.

46 [Endorsed:] 11093. United States Supreme Court. Lippman Toplitz & ano., plaintiffs in error, *vs.* Edward L. Hedden, defendant in error. Joinder in error. Stephen A. Walker, attorney for defendant in error. Due service of a copy of the within joinder in error is hereby admitted this 12th day of Dec., 1888. ——— ———, attorneys for plaintiffs in error. To Chas. Curie, attorney for plaintiffs in error. U. S. circuit court. Filed Dec. 12, 1888. John A. Shields, clerk.

47 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

LIPPMAN TOPLITZ and HERMAN SCHWARZ *vs.* EDWARD L. HEDDEN. } Bond for Costs.

Know all men by these presents that we, Henry Irwin and Herman H. Yonge, are held and firmly bound unto the above-named Edward L. Hedden in the sum of two hundred and fifty dollars, to be paid to the said Edward L. Hedden; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 16th day of November, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas the above-named Lippman Toplitz and Herman Schwarz have prosecuted ther writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Lippman Toplitz and Herman Schwarz shall prosecute their said writ of error to effect and answer all costs if they fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

H'Y IRWIN. [L. S.]
HERMAN H. YONGE. [L. S.]

Sealed and delivered and taken and acknowledged this 16th day of November, 1888, before me—

GEO. W. WRIGHT,
Notary Public, Kings Co.

Certificate filed in New York Co.

48 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

Herman H. Yonge, being duly sworn, does depose and say that he is a freeholder; that he is worth the sum of two hundred & fifty dollars over and above all his just debts and liabilities.

HERMAN H. YONGE.

Sworn to this 17th day of November, A. D. 1888, before me—

GEO. W. WRIGHT,
Notary Public, Kings Co.

Certificate filed in New York Co.

UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

Henry Irwin, being duly sworn, does depose and say that he is a freeholder; that he is worth the sum of two hundred & fifty dollars over and above all his just debts and liabilities.

H'Y IRWIN.

Sworn to this 16th day of Nov., A. D. 1888, before me—

GEO. W. WRIGHT,
Notary Public, Kings Co.

Certificate in New York Co.

[Endorsed:] 11093. U. S. circuit court, southern district of New York. Lippman Toplitz and Herman Schwarz *vs.* Edward L. Hedden. Bond for costs on writ of error. Approved as to form, amount, and sufficiency. E. Henry Lacombe. U. S. circuit court. Filed Nov. 20, 1888. John A. Shields.

49 UNITED STATES OF AMERICA, *ss:*

To Edward L. Hedden, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-nine, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Lippman Toplitz and Herman Schwarz are plaintiff- in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Dated November 20th, 1888.

E. HENRY LACOMBE.

50 [Endorsed:] No. 11093. U. S. Supreme Court. Lippman Toplitz *et al.*, plaintiffs in error, against Edward L. Hedden, defendant in error. Citation. Charles Curie, attorney for plaintiffs in error. Due service of a copy of the within citation is hereby admitted this 20 day of November, 1888. Stephen A. Walker, P., attorney for defendant in error. U. S. circuit court. Filed Nov. 20, 1888. John A. Shields, clerk.

Endorsed on cover: Case No. 13,569. S. New York C. C. U. S. No. 369. Lippman Toplitz and Herman Schwarz, plaintiffs in error, *vs.* Edward L. Hedden, late collector of the port of New York. Filed June 8, 1889.

Office Supreme Court U. S.
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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892

LIPPMAN TOPLITZ ET AL.

vs.

EDWARD L. HEDDEN.

No. 45.

BRIEF FOR THE PLAINTIFFS.

[redacted],

EDWIN B. SMITH,

No. 120 BROADWAY, NEW YORK,

Of Counsel.

C. G. BURGOYNE, Cor. Walker and Centre Sts., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

LIPPMAN TOPLITZ, ET AL.	)	
vs.		No. 369.
EDWARD L. HEDDEN.	)	

BRIEF FOR PLAINTIFFS.

Statement.

The facts are thus very fully recited in the bill of exceptions:—(commencing at p. 8 of Record.)

The plaintiffs' counsel, to sustain the issues on his part, read in evidence twenty-four invoices, dated in 1885, headed as follows: "Invoice of Scotch bonnets, per steamship....., for entry at New York, sold to Messrs. L. Toplitz & Co. by Alexander & Smith, of Stewarton, Scotland," and the like number of entries thereon at the Custom House, in some of which the goods were described as worsted knit bonnets and in others as worsted caps, and the like number of protests, in each of which the following is the substance (omitting formal conclusion);—

NEW YORK, Oct. 14, 1885.

HON. EDWARD L. HEDDEN,
Collector of Customs, New York.

SIR—We hereby protest against your decision and assessment of duties as made by you and the payment of more than 30 per centum *ad valorem* on our importations below mentioned consisting of certain bonnets and hoods of hair, wool or worsted or other material, and not especially enumerated or provided for, claiming that under existing laws and particularly by Schedule K, Act March 3, 1883, said goods are liable to no more than 30 per centum *ad valorem* and not at 24c. and 35 per centum, 35c. and 40 per centum or 40c. and thirty-five per centum, or as charged by you and we give notice that we pay all other higher rates than is claimed above as the legal rate under compulsion and to obtain possession of our goods; and we also give notice, etc., etc. (Rec. 8 middle.)

[ENDORSED:] 16899. L. Toplitz & Co. Anchoria. *Bonnets & hoods.* Custom-house, New York. Oct. 14, 1885 received. E. H. L., Jan. 10, 1888. Exhibit 5 P.

Plaintiffs proved that the goods therein referred to were imported by the plaintiffs about the dates of said entries, and that the defendant exacted duty thereon under Schedule K of Section 2502 of the Act of March 3, 1883, as knit goods made on knitting frames; that the dates at which said invoices were made and dated and the said entries were entered at the Custom House and the duties were exacted and paid and the said protests were duly filed and appeals were taken to the Secretary of the Treasury and at which the Secretary decided thereon and omitted to decide are all set forth in the bill of particulars, a copy of which is a part of the judgment roll. (Rec. 9.)

That plaintiffs paid the duties before obtaining possession and in order to obtain the goods and brought this suit in due time to recover back the amounts claimed to have been illegally exacted. *(Ibid.)*

The plaintiffs claimed that the said goods were duti-

able at thirty per cent. *ad valorem* under Schedule N of Section 2502 of the Act of March 3, 1883, as "bonnets for men," and called as a witness—

LIPPMAN TOPLITZ, who, having been duly affirmed, testified that he was one of plaintiffs and a member of the firm of Toplitz & Co., of New York, and that his business was that of importer of Scotch caps and other goods.

That the invoices and entries produced were the invoices and entries of his firm, and that the goods referred to in them were imported from Scotland, where they were manufactured; that the samples produced were samples of the importations in question, and that the articles so produced were Scotch bonnets.

Being cross-examined, the witness testified that he had been in his present business over thirty years and had been importing the articles in controversy since 1863; that they are pretty much all imported from Scotland that they were known in this country as Scotch bonnets and sold as such; that people who bought them from him asked for them by the name of Scotch bonnets most of the time. Once in a while a man comes along and asks for Scotch caps, but that they were more frequently called bonnets than caps.

That he had one other suit against the Government than the one on trial, under the old tariff; that he did not know whether it was tried. There was no trial in that suit. *(Ibid.)*

Q. Was the claim then that these goods are caps made on frames? (Rec. 9, bottom.)

Plaintiffs' counsel objected on the ground that the record was the best evidence of the claim. The Court overruled the objection and plaintiffs' counsel duly excepted. *(Ib.)*

The witness answered:—"Yes; I think that is it. Similar goods were concerned in that." *(Ib.)*

The witness further testified that the caps in the suit on trial were made of wool knitted on frames and shrunk and then blocked. (Rec. 9, 10.)

Q. Now, Mr. Toplitz, do you remember that in the summer of 1882, when a bill was pending before Congress to amend the statutes by excluding wool goods from the provision for caps and other articles made on frames, that your firm addressed a letter to the Hon. S. S. Cox, a member of Congress from this city, protesting against the passage of that law? (Rec. 10, top.)

To this question plaintiffs' counsel objected as immaterial, and that the witness has no right to state the contents of the letter, and that the letter itself would be the best evidence.

The Court overruled the objection and plaintiffs' counsel duly excepted. *(Ib.)*

The witness answered:

They had correspondence to that effect—to some effect. I don't know what exactly. Our firm wrote a letter. I did not. (Rec. 10.)

Q. Now, I show you what purports to be a copy of that letter and ask you if it is a copy. *(Ib.)*

Objected to on the ground that the original was not produced. The objection was overruled and plaintiffs' counsel duly excepted. (Rec. 10, fol. 21.)

Defendant's counsel then offered it in evidence.

Plaintiffs' counsel objected. The Court overruled the objection and plaintiffs' counsel duly excepted *(Ib.)*

Defendant's counsel then read it in evidence as follows:

"JUNE 16, 1882.

"HON. S. S. COX,
"Member of Congress,
"Washington.

"SIR: We take the liberty of inclosing you a copy of one of the letters which we sent to several newspapers here. As you will perceive from the contents of this letter, it refers to the additional duty which Mr. Kelley of Pennsylvania, moved to have put on the woolen knitted goods. The Supreme Court has decided that the way the law reads now in reference to knitted goods there is no error, and, as there has been a commission appointed by Congress for the revision of the tariff, everything regarding the tariff should be left with that body. We are importers of woolen knitted caps, which is not an article of luxury, but a necessity: they are only worn by laboring men, and, up to the decision of the Supreme Court, we were compelled by the collector to pay from 90 to 120 per cent. for these goods, which we can prove you by the following:

We paid, in Europe, for some kinds of woolen caps, 10s. sterling, equal to $2.43		$2 43
Add to this a commission of 2½ per cent., on which we have also to pay duty, would make	$0 06	
Duty, 35 per cent	88	
Weight, 3½ pounds, at 50 cents	1 75	
		2 69
		5 12

which will plainly show you that the duty on this article was over 100 per cent.

We are now paying duty, according to the decision of the Supreme Court, 35 per cent., which, in addition to shipping expenses, commissions, insurance, &c., which is also 15 per cent.; therefore a protection for the so-much-abused home manufacturers of 50 per cent.; therefore not so bad as they appear to make it. There is a certain style of cap worn by the poorest laborers in the coal mines, but we cannot import these at the rate of duty formerly imposed upon it. The price of this cap is 6s. sterling, equal to $1.48, and, owing to the

coarseness of the wool, they weigh six pounds to the dozen, and the duty would therefore be over 150 per cent., while fine goods, of light weight manufactured of the finest quality of wool, and which could be considered a luxury, would be only 45 per cent. You will see from the above facts that if Congress should see fit to advance the tariff on this class of goods 50 per cent. it would be a great injustice.

We have no doubt you will use your influence in preventing as much as possible the passing of any bill for increase of duty. We think that importers have some rights, too, as they help to sustain the Government, while the so-much-abused home manufacturers only sustain their own pockets.

We remain, respectfully yours,

L. Toplitz & Co.,

New York. (Rec. 10, 11).

I was not present when my partner, Mr. Schwarz, appeared before the tariff committee of 1883 and made a statement with regard to the duties on those articles. I know he did make a statement. It was made orally. He did not write it out.

On entry No. 6 shown me, the goods are entered as worsted knitted caps. In entry No. 10 they are entered as worsted knitted bonnets. In entry No. 12 they are entered as knitted caps; same in No. 5. In several of the entries the word bonnets is written over the word caps, but it was not done by me. The work is done by the brokers. These altered entries were signed by me, and I cannot tell whether the alterations were made before I signed them or afterwards.

These goods have been known as bonnets since I have dealt in them, for 30 years. Generally here, and on the other side more so. (Rec. 11, fol. 23.)

The use of the term bonnet to designate articles such as these was more general in this country thirty years ago than to-day.

I have bought these goods for a long time.

Mr. Schwarz also bought them. I have bought them from a number of different manufacturers—bonnet

manufacturers. Alexander & Smith, of Stewarton, Scotland—Ayrshire, I believe—furnished the most. I have been buying of them quite a number of years. Most of the goods in this suit came from them, I think. I don't think the goods involved in the other suit of ours came from them. Our place of business is at No. 100 Greene street. Our sign is "Importers of Scotch Caps." (Rec. 11 bottom.)

Being re-examined, witness said:

I do not know any article other than those like these samples here, which are known in this country as bonnets for men. We were required to enter them at the Custom House as worsted knitted caps. (Rec. 12 top.)

And being cross-examined, witness said:

That some of the entries were changed from "caps" to "bonnets." Frequently clerks will accept bonnets; at other times they will want to classify the goods and make up the duty on them, and I am compelled to be dictated to by them; otherwise, I could never get the goods out. I did not see the order, but heard of it; the clerks told me. (Rec. 12.)

Q. Don't you know as a matter of fact that in more than half of the entries which have been presented to you to-day and which you have testified about that the goods were entered as worsted bonnets without the use of the word "caps" on them at all?

A. Well, it might have been one clerk; another one would not. One clerk would and another one would not. (*Ib.*)

Plaintiff's counsel reads in evidence a paragraph from Section 8 of the Act of July 14, 1862, as follows:

"On bonnets, hats, and hoods for men, women and children, composed of straw, chip, grass, palm leaf, willow, or any other vegetable substance, or of silk, hair, whalebone, or other material not otherwise provided for, forty per centum *ad valorem*." (Rec. 12, fol. 25.)

Plaintiffs' counsel then read in evidence the definition of bonnet from Webster's Dictionary as follows:

"Bonnet—a cap or covering for the head in common use before the introduction of hats and still used by the Scotch. 'And plaids and bonnets waving high.'—Sir Walter Scott.

(2) A covering for the head worn by females." *(Ib.)*

Also from Worcester's Dictionary, edition of 1887, and also from an edition of the same published in 1860:

"Bonnet—(1) a cap or hat worn by men. (Obsolete or antiquated). 'I think he bought his doublet in Italy, his bonnet in Germany.'—Shakespeare.

(2) A covering for the head worn by women." *(Ib.)*

Also from the Imperial Dictionary:

"Bonnet—(1) a covering for the head worn by men; a cap. 'Plaids and bonnets waving high.'—Sir Walter Scott.

(2) A covering for the head worn by women and distinguished from a hat by certain small details, which vary endlessly according to the fashion." *(Ib.)*

Also from Stormonth's English Dictionary:

"A cap or covering for the head of man or woman; a covering for the head worn by women. In Scotland, a round, worsted cap formerly much worn by men." *(Ib.)*

Also from Chambers' Encyclopedia, published in 1881 by the American Book Concern of New York as follows:

"Bonnet—a covering for the head. The French, from whom we have the word, apply it as we do to male as well as female head dress." *(Ib.* bottom.)

Also from the edition of Encyclopedia Britannica published by Scribner:

"A cap or bonnet without any peak, decorated with a spray of heather, was worn as a head covering, the bonnets of the chiefs being distinguished with the ad-

dition of eagle's feathers, and illustrations of the cap or bonnet are given."

"The male dress usually appropriated to dignified persons also consists of a close garment confined at the waist and furnished with tight and sometimes with loose sleeves, a robe or mantle with long hose, to which is often added a cap greatly resembling the Phrygian bonnet." (Rec. 13 top.)

Also a quotation from "Monastery," by Walter Scott:

"March, march, Ettrick and Teviotdale!
Why the deil dinna ye march forward in order?
March, march, Eskdale and Liddesdale!
All the Blue Bonnets are bound for the Border."
(Ib. fol. 26.)

Also the following:

"England shall many a day
Tell of the bloody fray
When the Blue Bonnets came over the Border."
(Ib.)

Also from the following plays of Shakespeare (Merchant of Venice, As You Like It, King Richard II, King Henry V): (Rec. 13, fol. 26.)

"*Ner.* What say you then, to Faulconbridge, the young baron of England?

"*Por.* You know I say nothing to him, for he understands not me nor I him. He hath neither Latin, French, nor Italian, and you will come into the Court and swear that I have a poor pennyworth in the English. He is a proper man's picture; but alas! who can converse with a dumb show? How oddly he is suited! I think he bought his doublet in Italy, his round hose in France, his bonnet in Germany, and his behavior everywhere."—(Merchant of Venice.)

"A lean cheek, which you have not; a blue eye, and sunken, which you have not; an unquestionable spirit, which you have not; a beard neglected, which you have not; but I pardon you for that, for simply your

having in beard is a younger brother's revenue. Then your hose should be ungarter'd, your bonnet unbanded, your sleeve unbuttoned, your shoe untied, and everything about you demonstrating a careless desolation." —(As You Like It.)

"What reverence he did throw away on slaves,
Wooing poor craftsmen with the craft of smiles
And patient underbearing of his fortune,
As 'twere to banish their affects with him.
Off goes his bonnet to an oyster wench."—(King Richard II.)

"Give me any gage of thine and I will wear it in my bonnet; then, if ever thou darest acknowledge it, I will make it my quarrel."—(King Henry V.)

Also from Book of Ezekiel:

"They shall have linen bonnets for their heads and shall have linen breeches upon their loins."

This under ordinances for the priests. *(Ib.)*

Plaintiffs' counsel then called as a witness David Prince, who, having been duly sworn, testified as follows:

I have been an importer. I was with the house of L. J. Phillips, of this city. I manufactured articles like samples produced in Scotland. We call them there bonnets. I was importing these goods for about six years—from 1865 until 1872. (Rec. 13 bottom.)

Plaintiffs' counsel then rested. *(Ib.)*

Defendant's counsel then called as a witness Martin McGarvey, who, having been duly sworn, testified as follows:

I reside at Utica, New York. I have been a brewer from six to eight years. I was in the business of manufacturing Scotch caps three and a half or four years—from 1883 to 1887. I was a Scotch cap manufacturer on 1st of January, 1883; have manufactured such goods as samples, only better. (Rec. 14 top.)

Q. Please state by what name on third of March,

1883, or immediately prior thereto, these goods were known in trade and commerce? *(Ib.)*

To this question plaintiffs' counsel objected: 1st, on the ground that Congress did not in the enactment have reference to commercial designation; and, 2d, as to the question of time, 1883, and some indefinite time. I think the time to which he refers should be more definitely stated. The Court overruled the objection and plaintiffs' counsel duly excepted. *(Ib.)*

A. Scotch caps. *(Ib.)*

Q. Please state whether on 3d of March, 1883, or immediately prior thereto, these goods were known in trade and commerce as bonnets for men. (Rec. 13, fol. 28.)

Objected to as immaterial and for same reason as before. Objection overruled. Exception. *(Ib.)*

A. No, sir. *(Ib.)*

Witness continued: These samples are made from carded wool knitted on frames.

Being cross-examined:

Q. Are they not made of worsted? Haven't they worsted in them? *(Ib.)*

A. I don't know what you mean by that. *I don't know what worsted is.* I don't know what you call worsted. There is no worsted used in those caps. As I understand, worsted is a coarser grade of goods than what those goods are manufactured from. There is no worsted in them, *as I understand worsted.* We call it yarn. *I don't know whether there is such a thing as worsted yarn.* This lining in the cap is of cotton. We buy that; the outside we manufacture. That is made of pure wool and shoddy without cotton. *(Ib.)*

Being re-examined by defendant's counsel, witness said:

I never dealt in bonnets or manufactured them. *(Ib.* bottom.)

Defendant's counsel then called as a witness Patrick Corbett, who, being duly sworn, testified as follows :

I have been in wholesale hat trade for about twenty-five years. I have dealt more or less in such articles as samples in this State.

Q. Are you able to state by what name such articles were commercially known and designated on 3d March, 1883, and immediately prior thereto? (Rec. 14 bottom.)

To this question plaintiffs' counsel objected as immaterial, and on the same grounds as above stated.

The Court overruled the objection and plaintiffs' counsel duly excepted. (Rec. 15 top.)

A. They were known as Scotch caps. *(Ib.)*

Q. Were they at that time known and designated as bonnets for men? *(Ib.)*

Same objection, ruling, and exception.

A. Not that I know of. *(Ib.)*

Being cross-examined, witness said :

I have been a dealer in hats and caps in this city. There is a large variety of caps in use besides those like these samples, made of other materials than wool, and some of wool. They are made of cloth, cassimeres, not all wool. There is a large variety made of cloths and of different styles from these samples and for use at different seasons of the year, some made of linen and some of cotton. *I never heard of a Scotch bonnet, except here in this room ; I don't know what bonnets are.* (Rec. 15, fol. 29.)

Defendant's counsel called as a witness Robert Dunlap, who, having been duly sworn, testified as follows :

I am in the hat business at 174 Fifth avenue and 181 Broadway, and also in Philadelphia and Chicago ; have been in that business about thirty years. We sell a large variety of headgear. There may be some that I

do not deal in. Whether we sell all varieties is a broad question. We also sell bonnets for women. I am familiar with samples in question, have dealt in them, and able to state how they were commercially known and designated in hat trade in March 3, 1883, and immediately prior thereto. I have never known them to be called anything else but caps; have never sold them under any other name; have purchased them of L. Toplitz & Co.; at that time there was in use in trade and commerce in this country bonnets for women composed of chip, which is a sort of straw. I don't know about grass. We have a ladies' department in our retail store. I am not sure there were bonnets for women composed of palm leaf or of willow; there were of straw and hair; there were not of whalebone. On the 3d of March, 1883, and immediately prior thereto, there was not any such term used in trade and commerce as bonnets for men. (*Ib.* and fol. 30.)

Being cross-examined, witness said:

I have imported articles like samples in suit from Scotland. They are known there as bonnets. I have heard them at times in this country called by another name than Scotch caps by Scotchmen. I have heard them called by Scotchmen bonnets. In the store on Fifth avenue Scotchmen would ask for the article by that name. We sell such goods as these in New York more particularly to the mechanic. Sometimes we sell them to Scotchmen, I suppose. (Rec. 15 bottom.)

Defendant's counsel then called as a witness William Russell, who, having been duly sworn, testified as follows: (Rec. 16 top.)

I reside in Vineland, New Jersey. I am a Scotch cap manufacturer. I have manufactured both in this country and in Scotland. I have manufactured in this country since 1881. I was engaged in the manufacture and sale of them in 1883. I am familiar with goods like samples and with their commercial designation in

this country on the 3d of March 1883 and immediately prior thereto. (*Ib.*)

Q. Please state how such goods were known and designated in trade and commerce at that time in this country. (Rec. 16, fol. 31.)

To this question plaintiffs' counsel objected as immaterial and on the same grounds as heretofore. The Court overruled the objection and plaintiffs' counsel duly excepted. (*Ib.*)

A. Scotch caps. I am a Scotchman. (*Ib.*)

Q. Please state whether in the year 1883 and immediately prior to the 3d of March you heard such goods as these designated in trade and commerce in this country as bonnets for men. (*Ib.*)

To this question plaintiffs' counsel objected as immaterial and on the same grounds as above stated. The Court overruled the objection and plaintiffs' counsel duly excepted. (*Ib.*)

A. No, sir; at that time I knew of no such article in trade and commerce in this country as bonnets for men (*Ib.*).

Being cross-examined by plaintiffs' counsel, witness said:

If any one should come to me and ask me for a bonnet I should have an idea of what he meant. I would suppose he meant a cap. He would have to specify what kind. A bonnet don't designate any particular kind of cap at all in Scotland. It is a general term. It is not near so general this last ten years as it was before that—not so common. Ten years ago it was only used amongst the common work people in Scotland. Then about the only thing in Scotland which was called a bonnet was a Tam O'Shanter, flat shape, like a pancake. Goods like the samples are sold in this country largely to working men, to Americans as well as Scotch-

men. I don't know of anything in trade and commerce called bonnets for men in this country. (*Ib.* and fol. 32)

Being re-examined by defendant's counsel, witness said:

"There has been no change in the commercial designation of these articles since the 3d of March, 1883. No man has ever asked me for a bonnet in this country. I have never sold any article under that name. I sell to jobbers in the trade and to retailers." (*Ib.*)

Defendant's counsel then called as a witness Charles Loomis, who, having been duly sworn, testified as follows; (Rec. 16 bottom.)

"I am in the Scotch department of Hurlbut, Shethar & Sanford, of this city. I have been with them about six months. Prior to that I was in the jobbing hat and cap business, and am somewhat familiar with goods like samples. They are know and designated in trade and commerce as Scotch caps. I don't know that I have ever known them designated as bonnets for men. (*Ib.* and 17 top.)

Being cross-examined, witness said:

"I have never imported. Whether the house I am with import I could not swear of my own knowledge." (Rec. 17 top.)

Defendant's counsel then rested. (*Ib.*)

Plaintiffs' counsel then read in evidence the definition of cap from Worcester's Dictionary as follows:

Cap.– A covering for the head; and from Webster's Dictionary as follows: A part of dress made to cover the head. (*Ib.*)

Plaintiffs' counsel then re-called David Prince, who testified as follows: (Rec. 17, fol. 33.)

I have imported articles like samples. I was in business prior to 1883, from 1866 to about 1870 or 1871.

Q. What was the designation in trade and commerce

during the time you were engaged in it of articles like samples ?

A. They were known sometimes as caps and sometimes as bonnets. *(Ib.)*

Being cross-examined, witness said:

They were more generally known as caps. *(Ib.)*

Plaintiffs' counsel then called as a witness Joseph Hart, who, having been duly sworn, testified as follows: *(Ib.)*

Our house is a manufacturer of straw goods and a commission house. I have imported articles like samples. We imported them about 1883. They were known in trade and commerce by importers and dealers in this country as Scotch caps and bonnets; *by both names.* *(Ib.)*

Being cross-examined, witness said:

I was in the business of importing Scotch caps about four years before 1883, and retired from it about 1884. *(Ib.)*

Plaintiffs' counsel then called as a witness Hermann Schwartz, who, having been duly sworn, testified as follows: *(Ib.)*

I am one of the plaintiffs; have imported since 1863. I think we import more than any other house. In March, 1883, and prior thereto these goods were known in this country as bonnets and caps, by some as bonnets and by some as caps, and have been so known as long as I have imported them—for 25 years. (Rec. 17 bottom.)

Q. I hand you a sample of a tweed bonnet and a tweed cap.

A. Yes, sir. These articles are subjects of importation in this country. I know the duties which are levied on them. *(Ib.)*

Q. What are those duties ? (Rec. 18 top.)

To this question defendant's counsel objected as immaterial, incompetent and irrelevant. The Court sustained the objection, and plaintiffs' counsel duly excepted. *(Ib.)*

Being cross-examined, the witness stated:

I have had special charge of the Scotch-cap business since 1863. I remember when a commission was appointed to revise the tariff in 1882, and that that commission held sessions in different parts of the country to listen to statements of importers and manufacturers. I appeared before the commission and made a statement. I cannot say whether the report produced is correct. I was not asked to sign anything, so as to read it over. I don't know whether they took exactly my words or not. I see a good deal in it that I did testify, but whether it is all I testified I cannot say; they may have left some words out; the main contents is what I stated; so far as it goes it is correct. *(Ib.)*

Defendant's counsel then offered to read some portion of the report to the jury. (Rec. 18 middle)

Plaintiffs' counsel objected. The Court overruled the objection and plaintiffs' counsel excepted. *(Ib.)*

Defendant's counsel then read as follows: *(Ib.)*

"NEW YORK, October 5, 1882?

"Mr. H. Schwartz, representing the firm of L. Toplitz & Company, New York, importers of Scotch caps, addressed the Commission as follows: I want to speak in regard to the tariff on worsted and knit goods. We are importers of worsted knitted caps, which are not a luxury and which are not even made here; but they are subject to a duty of one hundred per cent., in fact, and in regard to some of them, the coarse grades, the rate of duty is as high as one hundred and fifty per cent. They are classed as worsted and knitted goods. I have a report here which I made to Congress in regard to this matter, which I will read." (Rec. 18, fol. 35.)

Then follows the letter which was admitted the other day (Ante, p.).

"Q. Is this article knitted? A. Yes, sir; it is knitted on a frame. Q. Is that not done in this country?

A. One party in Utica made some on a machine which came from the other side; he knitted some caps, but most of them are brought over here. Q. What does that cap cost a dozen here now? A. About six dollars a dozen by the quantity, but they have to go through about four hands before they reach the wearer. By COMMISSIONER MCMAHON: What recommendation do you make? A. I make the recommendation that if there is from thirty-five to forty per cent., in addition to about fifteen per cent. for expenses for commissions, insurance, cartage, freight, &c., it would be a sufficient protection. Q. You recommend thirty-five or forty per cent., then, in lieu of the present duty? A. Yes, sir; but at any rate take away the pound:" *(Ib.)*

MR. STANLEY: What are you reading? (Rec. 19 top.)

MR. W. W. SMITH: I am reading such parts of it as I desire and pick out all the way through. (Continuing:) *(Ib.)*

"That would be practically taking away the pound duty? Well, it was thirty-five per cent. until recently, when Congress changed the law. We brought a lawsuit against the Government, claiming that these articles ought not to pay more than thirty-five per cent., as specially provided for, and we won that suit. That is the knit-goods suit that I refer to. Now, Congress has passed the law over again." (Rec. 19, fol. 36)

DEFENDANT'S COUNSEL: Q. Well, now, Mr. Schwartz, I understood you to say on your direct examination that these goods had been known as bonnets in this country ever since you began to import them, in 1863.

A. I didn't state that. I said bonnets and caps. They were at any rate, partially known as bonnets and so known at the time I brought the first suit, in which I claimed those articles were caps made on frames. I don't know whether I knew, at the time I appeared before the Tariff Commission, what the rate of duty was upon bonnets, hats and hoods for men, women and children. I don't remember. I testified that these

goods were known in trade and commerce in this country as bonnets and caps. Most of them call them caps. I call them sometimes bonnets and sometimes caps. Buyers call them sometimes bonnets and sometimes caps---most generally caps. *(Ib.)*

The parties agreed that if the plaintiffs were entitled to recover the amount would be $7,191.97. *(Ib.)*

Both parties then rested. (Rec. 19, fol. 37).

Defendant's counsel made a motion that the jury be directed to find a verdict in favor of defendant. *(Ib.)*

Plaintiff's counsel then moved that a verdict be directed for the plaintiffs, and if that motion should be denied, then the cause should be submitted to the jury. *(Ib.)*

The Court denied the motion of the plaintiffs' counsel to direct a verdict for the plaintiffs, and the plaintiffs' counsel duly excepted. *(Ib.)*

Plaintiffs' counsel then asked the Court to submit the case to the jury. *(Ib.)*

The Court refused so to do, but offered to submit to the jury the sole question whether, at the time of the passage of the Tariff Act of March 3d, 1883, the word bonnet had in this country a well-known technical commercial designation such as would cover goods of this kind. *(Ib).*

Plaintiffs' counsel disclaimed any desire to go to the jury on that question alone, but asked leave of the Court to go to the jury generally. *(Ib.)*

The Court denies the motion, and plaintiffs' counsel duly excepted. *(Ib.)*

Thereupon the Court directed a verdict for the defendant, and the plaintiffs' counsel duly excepted. *(Ib.)*

Such verdict was accordingly rendered (Rec. 7) and judgment in favor of defendant entered thereon. (Rec. 7, 8.)

Statutes.

Duties were assessed by the defendant upon the plaintiffs' goods under this provision of the Act of 1883, Schedule K ;—

Flannels, blankets, hats of wool, knit goods, and all goods made on knitting frames, balmorals, woolen and worsted yarns, and all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca, goat, or other animals (except such as are composed in part of wool) not specially enumerated or provided for in this act, * * *

Valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents a pound ;

And in addition thereto, upon all the above-named articles, thirty-five per centum *ad valorem.*

Valued at above eighty cents per pound, thirty-five cents per pound and, in addition thereto, forty per centum *ad valorem.*"

(22 Stats., 509 top).

The importers claimed their importations to be "specially enumerated" and provided for by this clause of Schedule N of that act ;—

"Bonnets, hats and hoods for men, women and children, composed of chip, grass, palm-leaf, willow, or straw, or any other vegetable substance, hair, whalebone, or other material, not specially enumerated or provided for in this act, thirty per centum *ad valorem.*" *(Ib.* 511.*)*

Assignment of Errors.

The plaintiffs in error asign for error

1st. The admission of this question and answer, relative to a prior suit of Lippman Toplitz against "The Government," under a former tariff, which was never brought to trial;—

Q. Was the claim then that these goods are caps made on frames?

Ans. Yes. I think that is it. (Rec. 9 bottom.)

2d. The admission of this question and answer;—

Q. Now Mr. Toplitz, do you remember that in the summer of 1882, when a bill was pending before Congress to amend the statutes by excluding wool goods from the provision for caps and other articles made on frames, that your firm addressed a letter to the Hon. S. S. Cox, a member of Congress from this city, protesting against the passage of that law.

Ans. They had correspondence to that effect—to some effect. I don't know exactly. Our firm wrote a letter. I did not. (Rec. 10 top.)

3d. To the admission of this question;—

Q. "Now I show you what purports to be a copy of that letter, and ask you if it is a copy?" (Unanswered.) (Rec. 10, fol. 21.)

4th. The admission of alleged copy of said letter dated June 16, 1882, purporting to have been signed by L. Toplitz & Co., addressed to "Hon. S. S. Cox, Member of Congress, Washington." (Rec. 10, 11.)

5th. The admission of this question, and the answer thereto;—

Q. "Please state by what name on 3d of March,

1883, *or* immediately prior thereto, these goods were known in trade and commerce?"

Ans. "Scotch caps." (Rec. 14 top.)

6th. The admission of this question, and its answer;—

Q. "Please state whether, on 3d of March, 1883, *or* immediately prior thereto these goods were known in trade and commerce as bonnets for men?"

Ans. "No, sir." (Rec. 14, fol. 28.)

7th. The admission of this question and answer, viz;—

Q. "Are you able to state by what name such articles were commercially known and designated on 3d of March, 1883, and immediately prior thereto?"

Ans. "They were known as Scotch caps." (Rec. 14–15.)

8th. The admission of this question and answer;—

Q. "Were they, at that time, known and designated as bonnets for men?"

Ans. "Not that I know of." (Rec. 15 top.)

9th. The admission of this question and answer;—

Q. "Please state how such goods were known and designated in trade and commerce at that time [March 3d, 1883] in this country?" (Rec. 16, fol. 31.)

Ans. "Scotch caps. I am a Scotchman." *(Ib.)*

10th. The admission of this question and answer;—

Q. "Please state whether in the year 1883, and immediately prior to the third of March, *you heard* such goods as these designated in trade and commerce in this country as bonnets for men?"

Ans. "No, sir; at that time I knew no such article in trade and commerce in this country as bonnets for men." (Rec. 16, fol. 31.)

11th. To the exclusion of this question relative to a tweed bonnet and tweed cap identified by the witness to whom the question was put, who stated he knew the duties levied upon them :—

Q. " What are those duties ? " (Rec. 18 top).

12th. To the admission and reading in evidence of the report of a statement said to have been made before the Tariff Commission Oct. 5, 1883, by Mr. H. Schwartz, one of the plaintiffs. (Rec. 18, 19, fols. 35, 36.)

13th. The refusal of the Judge to direct a verdict for the plaintiffs, as by them requested. (Rec. 19, fol. 37.)

14th. The refusal of plaintiffs' request to have the cause submitted to the jury. (*Ib*).

15th. The granting of defendant's motion for the direction of a verdict in his favor, and the directing of a verdict in defendant's favor. (*Ib*. 1 and 7.)

16th. The judgment for the defendant entered upon the verdict rendered, by direction of the Court, in favor of the defendant. (Rec. 7.)

Points.

The Court below reached an erroneous conclusion, upon inadmissible evidence.

If found to have accepted improper testimony, the inference is natural that this induced a wrong judgment ;—which we deem unsupported upon *all* the evidence, admissible and inadmissible.

I.

The matter of a claim regarding 'similar' goods, under the different phraseology of an earlier tariff was utterly immaterial—especially when that claim was shown never to have been pressed, but abandoned.

Being a legally-made 'claim,' it must, in the ordinary course of procedure, have passed into the hands of the U. S. Attorney; so the record, which was the best evidence, was easy to be produced by him.

The provision in the wearing-apparel clause of Sched. M. 'Sundries' of the Revised Statutes was for wearing-apparel of every description, wholly or partially made up, "caps," gloves, socks, etc., "and all *similar* articles made on frames, of whatever material composed, except silk and linen, worn by men, women, or children," n. o. p., etc., etc. (Rev. Sts., 2d ed., p. 474, bottom.)

No such provision is found in the Act of 1883, under which the present importations were made! (22 Stats. 511.) There is only a provision for wearing-apparel of wool, worsted, etc., *not* enumerating caps. (*Id.* 509.)

The Government then contended for the application of the clause it now seeks to apply: a ground of protest against it was that the wearing-apparel, cap, provision, was more definite. Our goods were known indifferently as 'caps' or as 'bonnets'; if not technically "caps" etc., they were a 'similar' article, made on frames.

As between that and the 'knit-goods' provision, the importer alleged the wearing apparel clause should prevail; and this Court sustained that claim.

Vietor vs. Arthur, 104 U. S. 498,

(where the syllabus accidentally omits the word '*not*,' before 'dutiable.')

With the wearing apparel, cap, clause out (since *neither party now claims its applicability*) we now contend that the 'bonnet' clause is to be preferred to

that for which the United States vainly contended in the Victor case.

This entire change of phraseology, and the indefinite statement as to our 'claim' under the revision, shows the prejudicial effect of this testimony; and why we demanded the best evidence of that 'claim' (in the hands of our opponents) should be produced.

II.

1. What we have said above sustains our objection to the materiality (Rec. 10 top) of the letter to Mr. Cox. (Rec. 10.)

2. *It was read without the slightest proof that it was a copy. (Ib.)*

III.

Several witnesses were inquired of as to the commercial designation of our importations on and prior to March 3, 1883;—precisely, whether they were known as "bonnets for men;" or whether there was any such designation in trade. These questions and the answers are fully recited in our assignment of errors, 5th to 10th. (*Ante*, pp. .)

Our principal objection to them (as a whole) was and is that the whole phrase "Bonnets, hats, and hoods for men, women and children composed of," etc., is *not* a commercial designation, but is manifestly descriptive.

Barber vs. Schell, 107 U. S., 621.

There are other objections, of form and substance, as to some of these questions.

We may premise that the *negative* proof adduced (that there was no such commercial term) only strengthens our position, that Congress did not intend the language to be taken any otherwise than in its ordinary significance.

The question put was *not* whether the word 'bonnets' had then any commercial meaning, sufficiently extensive to include those worn by men, but whether the coined phrase "bonnets for men" had any trade meaning.

In 1853, this Court held the 'wearing apparel' clause of the Act of 1846 not to intend any commercial designation.

"By the several prayers pressed upon the Circuit Court for instructions to the jury, the object to which they all directed has been the diversion of the jury from this the only legitimate inquiry before them. *The effort has been to substitute for the literal and lexicographical and popular meaning of the phrase "wearing apparel," some supposed mercantile or commercial signification of these words, and to render subservient to that signification what was clearly accordant with the etymology of the language of the statute,* with the essential purposes and action of the Government, and with the widespread, if not the universal understanding, of all who may not happen to fall within the range of a limited and interested class. In instances in which words or phrases are *novel* or *obscure*, as *in terms of art*, where they are peculiar or exclusive in their signification, it may be proper to explain or elucidate them by reference to the art or science to which they are appropriate; but if language which is familiar to all classes and grades and occupations—language, the meaning of which is impressed upon all by the daily habits and necessities of all, may be wrested from its established and popular import in reference to the common concerns of life, there can be little stability or safety in the regulations of society. . . . It would seem to be a most extravagant supposition which could hold that, in the enact-

ment of a law affecting the interests of the nation at large, the Legislature should select for that purpose language by which the nation, or the mass of the people, must necessarily be misled. The *popular or received import of words* furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the Legislature adopts such language in order to define and promulge their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large."

Maillard vs. Laurence, 16 How., 261.
Schneider vs. Barney, 113 U. S., 646, bot.

Our case presents this curious phase;—The Government duties our importations under the clause of Schedule K of the Act of March 3, 1883, "as knit goods, made on knitting-frames." (Rec. 9 top.) We set up, as applicable, another description ("Bonnets, hats, and hoods, for men, women, and children," etc.) in the same act claiming that our goods are 'bonnets,' within both the ordinary and technical meaning of *that* word; that they are, in every sense, 'bonnets' and are, in fact, for men's use. Thereupon the defendant picks up *a phrase, not* employed in the statute, and introduces evidence that *the so-adopted phrase* (not the single word 'bonnets') had *no* commercial meaning in 1883, or immediately prior thereto.

In ordinary parlance, it had a meaning easily understood.

Congress intended to duty 'bonnets' at 35 per cent., whether to be worn by men, women or children. The style might differ, as the wearer was to be one or the other of these, but, if known at all as a 'bonnet,' it was dutiable at this rate, irrespective of the age or sex for which it was designed.

Hats and hoods are worn indiscriminately by either.

It is not material by which name, hat or bonnet, or cap or bonnet, an article of men's head-gear (known *at all* as a 'bonnet') is the more frequently designated. It is a sufficient reply (even in the case of capital indictment) to a plea of misnomer, that the respondent is known by the name assigned him in the indictment as well as by that claimed in his plea.

Accept, for the sake of the argument, that there is no such commercial phrase as "bonnets for men"; or as "bonnets" including a head-covering for men's use —although defendant's testimony does not go to that extent; yet, as Congress has used the word 'bonnets' as applicable to both sexes, this would only show that the language was not intended to be technical, if it be also shown that it is susceptible of this meaning in the speech of everyday life. The inquiry is not what word is more frequently used in ordinary speech, but is the word so used at all, in the sense apparently assigned it in the statute.

"If the commercial designation fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation."

Robertson vs. Salomon, 130 U. S. 415, middle.

The next paragraph of that opinion antagonizes the view expressed by Judge LACOMBE, in connection with his direction of a verdict for the defendant, in the cause at bar. (Rec. 20, fol. 38.)

He assumes that the evidence of the common use, meaning and comprehensiveness of the word 'bonnet,' especially in its connection with the words 'for men,' was not for the jury, but solely for refreshing the memory of the Court. (*Ib.*)

Judge BRADLEY, on the contrary, in the opinion from which we have already quoted, proceeds to state the law, and the error in that case, thus ;—

"The common designation, as used in every-day life . . . would be very proper to be shown, in the absence of further light from commercial usage. We think the *evidence* on this point ought to have been admitted." Robertson vs. Solomon, 130 U. S. 415, top.

Undoubtedly, the universally accepted meaning of words in the vernacular may be a matter for judicial cognizance; but *not where this meaning is an issuable fact* in the case, upon which evidence is adduced, especially where the testimony is contradictory.

In a country of the extent and population of ours, intended to be subjected to uniform imposts, words are often employed tautologically or redundantly in tariff legislation, to insure their being given the widest scope everywhere. To restrict their application is to defeat the object of their insertion. Among a people compounded of contributions from every quarter of the globe, a word or meaning unaccustomed to the ears of one class or section may be perfectly familiar to those of another. We speak now of the popular, not of any technical, meaning. These bonnets, worn mostly by miners and mechanics, may be commonly so designated by them, without this being known to "the learned professions." Frequently, the foreign name, or origin, becomes the American name, the designation being imported with the article; as lisle thread, valenciennes lace, mousselin-de-laine, Scotch bonnets, cartons, Paris white, cayenne pepper, cocculus Indicus, pate foie gras, etc., etc.

No one can read this clause of the tariff without perceiving that its verbiage was employed to *enlarge*, not to restrict, the meaning and effect of the words "bonnets, hats or hoods;"—otherwise the "men, women and children" would have been omitted.

Without pausing to comment upon the form of the several questions specified in our assignments of error, 5 to 10 (*ante*, p.) it may be well to suggest that they

have the common error of confining the testimony to the time "immediately prior to March 3, 1883"—whereas this paragraph, dutying "bonnets, hats and hoods for men," etc., appeared in tariff legislation at least as early as July 14, 1862 (12 Stats. 551 top)—and the question is, what it meant *then;* for the same phraseology, transmitted through successive tariffs, can hardly be construed to mean, in the last, anything different from what it did in the first.

It was proved, by witnesses upon both sides, that these articles were more generally designated as "bonnets," in Scotland and this country, ten to thirty years ago than at the date of the trial. (Rec. 11, fol. 23; 15 bottom; 16, fol. 31; 17 bottom.) And it was thirty years ago, this language was first adopted by Congress in laying duties. (Rec. 12 middle.)

IV.

There was no sufficient foundation or materiality for reading "some portion," "such parts as I [Asst. Dist.-Atty.] desire and pick out all the way through," severed from the context of the putative statement of Mr. Schwartz before the Tariff Commission. (Rec. 18, 17.)

V.

Upon defendant's own showing, a verdict should have been directed for the plaintiffs.

Defendant's whole testimony was directed toward showing that—these articles being bought and sold as 'Scotch caps'—"bonnets for men" had *no* commercial

meaning. (Rec. 14, fol. 27; 15 top and bottom; 16, fols. 31 and 32; 17 top.)

The oral and printed testimony was all one way, that in ordinary speech, from 1862 down, more universally formerly than at present, they were known and spoken of as 'bonnets,' intended and used for men's wear. (Rec. 9, fol. 19; 11, fol. 23; from 12 top to 13 bottom; 15 bottom; 17; 19, fol. 36.)

VI.

Unless a verdict was, upon this testimony, directed for the plaintiffs, the cause should certainly have been submitted to the jury, instead of a direction being given in favor of the defendant.

There was no propriety in the "offer" to submit solely whether on March 3, 1883, the word 'bonnet' had a *technical commercial* designation, such as would cover the goods in question. (Rec. 19, fol. 37.)

1. This limitation was too narrow in date, in view of the fact that the language in which the word occurs was adopted July 14, 1862.

2. It was too narrow, in confining the inquiry to this one word, irrespective of the context.

3. There was no justification for restricting our right to a jury trial, upon conflicting testimony, to a single question, *not* determinative of the whole case.

The legal presumption, in the absence of contrary evidence, is that the ordinary meaning is that intended by the statute (16 How. 251; 113 U. S. 648 top), and that the trade meaning does not differ therefrom; "but if the commercial designation [say, 'caps'] fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation." (130 U. S. 415.)

If the jury found, upon the evidence, that 'bonnet' had no technical meaning, then they were to decide whether, as a common designation, in the connection in which it was used, it included coverings for men's heads.

"Without any evidence" *(Ib.)* a Court may act upon facts within its judicial cognizance; but cannot so act, where testimony has been regularly taken which is directly contrary to that view of the facts to which the Court inclines. That there is much sworn testimony against this view of the Court shows the issue to be one for the jury.

Though the construction of a written contract is ordinarily for the Court, yet if parol testimony is admitted to affect its purport, or aid in the construction of its terms, then the whole is to be left together to the determination of the jury.

Bolclos vs. Seymour, 17 C. B. (N. S.) 107.
Moore vs. Garwood, 4 Exch. 681.

Practically, it comes to the same thing, whether the Judge erred as to the proper construction to be given to the statute in the light of proven facts, or should have left the conclusion to be drawn from these facts to the determination of the jury. In either case, our task is the same; to draw the attention of the Court to that portion of the evidence and those circumstances to which the Judge apparently gave no weight; and directed a verdict for the defendant by ignoring this part of the record.

"This direction was wrong, if there was *any* evidence for the jury on the second question; or if it was a question for the Judge, and he ought to have decided it in favor of the plaintiff."

Ashpitel vs. Sercombe, 5 Exch. *163.

(1.) As to the *trade* meaning.

After the District-Attorney had introduced several witnesses (of whom we will speak further presently) who testified that our importations were known in

trade as 'Scotch caps'; and, negatively, that they were not known in trade as 'bonnets for men,' the plaintiffs called three witnesses who testified, affirmatively, that these articles were known as '*bonnets*,' as well as 'caps'; or 'Scotch caps,' or 'bonnets.' (Rec. 17.)

These witnesses, speaking affirmatively, are rather to be credited than those who merely have *not* heard the term.

Stitt vs. Huidekopers, 17 Wall. 394.

As Judge LACOMBE has remarked in many (more recent) cases, it is not enough that these goods *were* known as 'Scotch caps,' unless it be further shown that they were *not* also known as bonnets; or as included within that term.

Of those five witnesses who had not heard the term "bonnets for men" applied to these goods, the first was a brewer (Rec. 14 top) who, from some unstated cause, diverged into the "Scotch cap" manufacture for three or four years. (*Ib.*)

He did not know what worsted was, nor how it differed from wool. (*Ib.* fol. 28.) His experience, in duration and character, hardly qualified him to speak of a term that had been in the tariff nearly twenty years before he embarked in this business.

The next witness swore;—"*I never heard of a Scotch bonnet, except here in this room; I don't know what bonnets are.*" (Rec. 15, middle.) The next witness, Mr. Dunlap, swore that, though 'bonnets for men' was not a commercial term, the article was (by Scotchmen) inquired for as 'bonnets.' (*Id.* bottom.) In proportion to their numbers, Scotchmen would be likely to call more often for these goods, from their own country, than persons of other nationalities. A dealer must have little experience, or small powers of observation, who never heard or recollected this term at all, as applied to these goods. The next witness (Wm. Russell) while denying 'bonnets for men' to be a commercial designation, would at once catch the idea of these goods being

meant, if a man asked him for a bonnet; (Rec. 16 middle) so he had heard that term applied to them; only not often enough (in his opinion) to constitute it a trade designation.

The brief experience of the defendant's last witness (Loomis, Rec. 16 bot. and 17 top) only enabled him to swear; "*I don't know* as I have ever heard them designated as bonnets for men." (*Id.* 17 top.)

Certainly, there was a direct conflict of testimony, as to the commercial name of the article, if we treat the terms 'bonnets' (sworn to by plaintiffs' witnesses) and that ('bonnets for men') to which defendant's witnesses directed their attention as synonymous; otherwise, our testimony was uncontradicted.

Our claim to have the whole case submitted, and our rejection of the 'offer' to submit this single question did not authorize a direction for the defendant.

2. The ordinary meaning of 'bonnets,' especially when coupled with the expression 'for men, women, and children.'

After the testimony of Mr. Toplitz (who had then been in business *over* thirty years, importing this identical article since 1863) that these goods are Scotch 'bonnets,' so known in this country, "more frequently called bonnets than caps" (Rec. 9, fol. 19) we read the paragraph from the Act of July 14, 1862, § 8 (*Id.* 12 middle) to indicate the first appearance of the phrase in a tariff, and then read dictionary and other authorities, whose definitions and usage conformed to the statement of the witness. This was supplemented by the like testimony of several other witnesses. (Rec. 17.)

In his opinion (Rec. 20, 21) the learned Judge quotes the definition of Murray's Dictionary, *which definition sustains our contention*, and then observes that it is not the English use of the word that concerns us. (*Id.* 21 top.) The English *language* is

spoken, in all substantial respects alike, in both countries; and it is to the point that the latest lexicons of this language, on both sides of the water, give this definition alike. *It negatives the idea that this application of the word is confined to Scotland,* although the thing to which it is applied is chiefly made there, but also manufactured here. *(Hinc illæ lachrymæ.)*

That Worcester marks it as 'obsolete *or* antiquated' does not change the fact that the very latest authorities define it, without such observation; nor is the use of 'antiquated' words or meanings, still prevailing among the many old-fashioned people who exist outside the 400, prohibited to legislators.

With Murray, referred to in the opinion *(Ib.)* compare Stormouth, the Imperial (Rec. 12 bottom) and those dictionaries more recently issued, not read at the trial, as the International (1890), Cassell's (1889) Encyclopædic, and the Century.

The latter's first definition—with no indication of antiquity attached—we will quote;—

(1.) "A covering for the head, worn by men and boys, and differing from a hat chiefly in having no brim; a cap, usually of some soft material."

"In Scotland, the term is applied to any kind of cap worn by men, but specifically" to certain (described) styles. Cent. Dict. 'Bonnets.'

Whatever may have been the origin or derivation of the words defined, or the force assigned them elsewhere, *it is this meaning in the English tongue, as employed here, that these works assume to give,* and not what they mean in Scotland or elsewhere.

If the word is foreign, but has been adopted, it is its meaning *here* that our dictionaries give us.

Defendant's witnesses, every one of them, testified these goods were known and dealt in as '*Scotch* caps.' (Rec. 14; 15 top and bottom; 16 top; 17 top.) Now, the name of origin being used to designate style, is it not quite credible, as *every* dictionary and our four wit-

nesses testify, that they are also called 'Scotch bonnets,' for the same purpose of discrimination of the *kind* of head-covering a man wants to buy. If a man only called for a 'cap,' he would not be shown this article; if he called for a 'Scotch bonnet' he would; can this be doubted? As qualifying cap or bonnet, the word 'Scotch' is alike employed to indicate the particular style of cap or bonnet wanted.

It is only because in this country, in the society in which the Judge moves, hats (either Derby or stove-pipe) are so exclusively worn, that the term bonnet, as applied to male head-gear, is so seldom heard. How often will he see one worn, in his daily experience.

Yet, we have the assurance, in every form, that those who do wear them, right here *in this country*, do designate them as 'bonnets,' as well as 'caps.'

If this specific designation *can* properly apply to this article, such construction should be given the statute, to favor commerce and the importer.

Hartranft vs. Weigmann, 121 U. S. 609.
Am. vs. Worthington, 141 *Id.* 474 bot.

The tariff of 1883 was not intended to be prohibitory, but an adjustment relaxing the demands of the preceeding war-tariff, under which these bonnets paid but 35%. (Rec. 11 top.)

Thirty per centum, with necessary expenses added, would be a more reasonable impost than to add an enormous pound duty to the 35% theretofore exacted upon these articles of miners' and workmen's wear—the importations of which are limited to the demand for such uses.

[redacted],
EDWIN B. SMITH,
[redacted],
Of Counsel.

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FILED.
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CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

LIPPMAN TOPLITZ AND HERMAN SCHWARZ, plaintiffs in error,
vs.
EDWARD L. HEDDEN, LATE COLLECTOR OF the port of New York.
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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT IN ERROR.

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The question in the court below was whether the articles imported should be assessed under the paragraph of the tariff act of March 3, 1883 (22 Stats., 509), which reads as follows:

> Flannels, blankets, hats of wool, knit goods, and all goods made on knitting frames, balmorals, woolen and worsted yarns, and all manufactures of every description composed wholly or in part of worsted, the hair of the alpaca, goat, or other animals (*except such as are composed in part of wool*) not specially

> enumerated or provided for in this act, valued at not exceeding thirty cents per pound, ten cents per pound; valued at above thirty cents per pound, and not exceeding forty cents per pound, twelve cents per pound; valued at above forty cents per pound, and not exceeding sixty cents per pound, eighteen cents per pound; valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents per pound; *and in addition thereto*, upon all the above-named articles, thirty-five per centum ad valorem; valued at above eighty cents per pound, thirty-five cents per pound, and *in addition* thereto, forty per centum ad valorem.

Or under the paragraph of the same act (*id.* 511), which reads as follows:

> Bonnets, hats, and hoods for men, women, and children, composed of chip, grass, palm-leaf, willow, or straw, or any other vegetable substance, hair, whalebone, or other material, not specially enumerated or provided for in this act, thirty per centum ad valorem.

The collector and the court below held that the goods were properly dutiable under the first section quoted. It is to reverse the judgment upon that point that the writ of error is sued out.

The goods in question were coverings for the head imported from Scotland. It is conceded that they were made of wool, and were knit on frames.

The plaintiffs in error insisted that they should be classified as bonnets. Evidence was heard upon the subject of their proper designation. Two members of plaintiffs' firm—Lippman Toplitz (Rec., 9), Herman Schwarz (Rec.,

17), and David Prince (Rec., 13 and 17)—were examined in behalf of plaintiffs. The first named testified on direct examination that the articles imported were "Scotch bonnets." * * * "They were known in this country as Scotch bonnets and sold as such; that people who bought them from him asked for them by the name of Scotch bonnets most of the time" (Rec., 9). On cross-examination it was shown that this witness had another suit against the Government under the old tariff for goods of the same character, and in that suit claimed that the goods were caps made on frames (Rec., 9). It also appeared that when the tariff act of 1883 was before Congress the firm had addressed a letter to Hon. S. S. Cox protesting against the duty and speaking of these goods as "woolen knitted goods," "woolen knitted caps," etc. (Rec., 10–11); that a member of the firm (Mr. Schwarz) had been before the tariff committee and made a statement (Rec., 11) in which it appears that Mr. Schwarz appeared as an importer of "Scotch caps" "to speak in regard to the tariff on worsted and knit goods," and said "we are importers of worsted knitted caps," * * * "they are classed as worsted and knitted goods" (Rec., 18). It also appeared that the sign over plaintiffs' place of business read "importers of Scotch caps."

The witness, David Prince, gave no testimony bearing on the question, as is submitted, not having been in business since 1872, nor testifying as to the present designation in the United States, or the designation at the time of the passage of the act of 1883. (Rec., pp. 13, 17.)

Herman Schwarz, of plaintiffs' firm, testified on direct examination: "In March, 1883, and prior thereto, these

goods were known in this country as bonnets and caps—by some as bonnets and by some as caps—and have been so known as long as I have imported them." (Rec., p. 17.) On cross-examination he testified that the statement made before the tariff committee, referred to above, "so far as it goes is correct" (Rec., p. 18), and at the same time recommended a duty on this class of goods of "thirty-five to forty per cent in addition to about fifteen per cent for expenses for commissions, insurance, cartage, and freight." (Rec., p. 18.) He also stated "we brought a lawsuit against the Government, claiming that these articles ought not to pay more than thirty-five per cent as specially provided for, and we won that suit. That is the knit goods suit that I refer to." He further testified that the goods were "most generally" known as "caps." (Rec., p. 19.)

As against this the Government introduced as witnesses Martin McGarvey, Patrick Corbett, Robert Dunlap, William Russell (Rec., pp. 14–17), who all testified that the goods were, immediately prior to March 3, 1883, known as Scotch caps, and Mr. Dunlap said there was not any such term used in trade or commerce as bonnets for men.

It is respectfully submitted that the evidence on the part of the plaintiffs below discloses an attempt to create a classification of these goods differing from the one which they had themselves acted upon and asserted in the most formal manner on numerous occasions and in connection with the very law now under discussion.

The court did not regard the evidence as material, holding (Rec., p. 20) that "words used in these tariff statutes when not technical, either as having a special sense by

commercial usage or as having a scientific meaning different from the popular meaning—in other words, when they are words of common speech—their interpretation is within the judicial knowledge, and is therefore a matter of law."

Upon an examination of Webster's and Worcester's dictionaries, which had been offered and received in evidence, he concluded that the word "bonnet" as applied to head gear for men had long been obsolete in this country (Record, 21), and as the goods in question were well known and had been imported as knit goods he concluded that the case was within the rule announced and directed a verdict for the defendant.

ARGUMENT.

The assignments of error are discussed in the order in which they are made by appellant.

With reference to the first assignment of error, it is submitted that the question was a competent one as affecting the credibility of the witness. Had a title been in question derived through the record the rule announced by plaintiffs' attorneys as ground of objection would have been the correct one. On cross-examination for the purpose indicated contradictory statements of the witness are admitted. It makes no difference whether these statements are oral or written, contained in a record or otherwise. If the witness was unable to answer without the record he might call for it to refresh his recollection.

The same remarks apply to the second assignment of error.

The third assignment of error is equally untenable. The witness was upon cross-examination, and was handed a letter and asked if it was a copy of a letter which he admitted had been written by the firm. It was competent to test his recollection in this way. If he could not state, all he had to do was to say so. This exception is not based upon the contents of the letter or its offer in evidence, but simply upon witness's knowledge whether it was a copy. If he was able to state that it was a copy there was no need to produce the original to confirm that fact.

The fourth assignment is based upon the admission of the copy of the letter. The record shows that "plaintiff's counsel objected" and "excepted" to its admission. (Rec., 10.) It does not show that they assigned any reasons for so doing, and under the settled practice of this court it is submitted that such objection and exception is unavailing. *Camden* v. *Doremus* (3 How., 515); *United States* v. *McMasters* (4 Wall., 680); *Burton* v. *Driggs* (20 Wall., 125); *Evanston* v. *Gunn* (99 U. S., 660).

This assignment and the following one are based upon questions addressed to the witness for the Government as to the commercial designation of the goods in question in March, 1883, and immediately prior thereto. The reasons assigned were that Congress did not in the enactment have reference to commercial designation, that the statement of time was too indefinite, and that the questions were immaterial. (Rec., 14.) It is insisted that no error was committed by admitting this testimony and that in construing and applying tariff acts it is always impor-

tant to ascertain, *first* the commercial name of the article involved in the controversy; *second*, the commercial meaning of the terms used in the tariff act. If no such term as bonnets applicable to covering for the heads of men was used or known in this country and such use was obsolete it must be assumed that Congress in using the term provided for a future change of fashions; it certainly can not be supposed that it was intended to apply the term to goods which had an accepted name and classification which was retained in the act. This is in accordance with the decisions of this court.

In *Robertson v. Salomon* (130 U. S., 412, 415) the following language was used:

> The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. See *Arthur v. Lahey* (96 U. S. 112, 118); *Barber* v. *Schell* (107 U. S., 617, 623); *Worthington* v. *Abbott* (124 U. S., 434, 436); *Arthur's Executors* v. *Butterfield* (125 U. S. 70, 75). But if the commercial designation fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation. We think, therefore, that the court erred both in its charge and in the exclusion of the evidence offered, especially as, without any evidence and with the common knowledge which we all possess, the court might almost have been justified in directing a verdict for the defendant.

In this case it is shown that the imported goods were commercially known as "caps" and not as "bonnets," and that caps was the common designation also. The

evidence in chief proceeded upon the theory that they were known as bonnets, and when the Government discredited plaintiffs' witnesses on this point complaint is made that the defendant was allowed to prove the contrary of their own proposition.

The evidence is clear, and it is submitted practically uncontroverted, that in this country at no time has the word "bonnets" included goods of this class. There is no evidence in the record that Congress used the term in any peculiar sense. We must therefore look to the popular meaning of the words. The practically uncontroverted testimony again is that the word "bonnets for men" did not include "Scoten caps." The words caps and bonnets are not technical as having a special sense by commercial usage, nor as having a scientific meaning different from the popular meaning. They are the words of common speech, and as such their interpretation is "within the judicial knowledge and therefore matter of law." *Marvel* v. *Merritt* (116 U. S., 11).

The mistake of plaintiffs consists in supposing that there must be a class of importations to correspond with every designation of the tariff, and not finding one to suit the description "bonnets for men" all they had to do was to take goods having a settled name and classification, to the settlement of which they had been parties in the courts, in Congress, and in the business sign displayed by them to the public for many years, and call them by the new name.

No one would for a moment suppose that these plaintiffs would have sought to make or suggest such a change but for the decreased duty. I have so far assumed that

"bonnets for men" were not known commercially or popularly at the date of the passage of the act of March 3, 1883. It is further insisted that these articles can not be classed as bonnets if commercially and popularly called "Scotch caps," even if it is assumed that the word bonnets is broad enough to cover them.

In *Arthur* v. *Morrison* (96 U. S., 108) the question was whether certain goods should be classed as "silk veils" or as "manufactures of silk." The phrase "silk veils" is a designation by "special description." (*Barber* v. *Schell*, 107 U. S., 617.) In its ordinary common meaning it applies to any veil in which silk preponderates. (*Swan* v. *Arthur*, 103 U. S., 598.) It was admitted the articles involved were veils and made chiefly of silk. But the court said, Waite, C. J., that they could not be classed as "silk veils" because they were never called silk veils by merchants, importers, or the people generally, but were called both in commerce and in the world at large "crape veils." There being no duty on "crape veils," and it being impossible for the reasons given to class them as "silk veils," the articles were classed under the general and comprehensive phrase "manufactures of silk." It is submitted that the present case can not be distinguished from these decisions, and therefore the assignment of error was not well taken.

All that has been said above relative to the fifth assignment of error applies to the sixth, seventh, eighth, ninth, and tenth assignments of error.

All these assignments, as well as the argument of counsel, assumed that the law (22 Stats., 511) uses the term

"bonnets for men." It does nothing of the kind. The language actually employed is "bonnets, hats, and hoods for men, women, and children," etc. This does not necessarily mean (1) bonnets for men, (2) hats for men, (3) hoods for men, (4) bonnets for women, (5) hats for women, (6) hoods for women, (7) bonnets for children, (8) hats for children, (9) hoods for children; or that, in other words, there must be three different species for each of the three generic terms. In behalf of the Government it is insisted that, assuming that Congress legislated solely with reference to articles then known and the subject of commerce, that the call of the statute is answered by the term "hats for men."

The eleventh assignment is based upon the refusal of the court to allow a witness to tell what duties "are levied upon" (Rec., 17, 18) a tweed bonnet and cap which were produced.

It is not shown that they belong to the same class or were of the same character as the goods imported; if not of the same character, evidence of what duties *are* levied upon them would scarcely tend to show what duties under the law should be levied upon goods of another class under the law of 1883.

The twelfth assignment relates to the admission of the statement made by Mr. Schwarz, of the plaintiffs' firm, before the tariff commission. (Rec., 18, 19.)

All that has been said relative to the *fourth* assignment of error applies to this one. No grounds of objection or exception were stated to the court below, and, therefore, error can not be predicated of the ruling there made in this

court. The evidence, it is submitted, was clearly competent as going to the credibility of the witness.

The thirteenth, fourteenth, fifteenth, and sixteenth assignments of error may be discussed together.

The court below directed the jury to return a verdict for the defendant. For reasons already given this was clearly right. It is submitted that there was no question of fact for the jury under the decisions of this Court, or, waiving that question for the purpose of argument, that the evidence of the occasional designation of the importations as "bonnets" was so slight, and came so entirely from interested parties whose conduct for many years was so at variance with their testimony, that it was worthless.

No court could have allowed the verdict to stand had it been in favor of the plaintiffs. Under such circumstances it was the duty of the court to direct a verdict for the defendant. The plaintiffs seem to suppose that the jury should have been afforded an opportunity to pass on the question if there was a scintilla of evidence in their favor. Such a rule has never obtained in the Federal courts. *Bowditch* v. *Boston* (101 U. S., 16); *National Bank* v. *Insurance Co.* (103 U. S., 783); *Pleasants* v. *Fant* (22 Wall., 116).

It is respectfully submitted that the judgment below should be affirmed.

CHARLES H. ALDRICH,
Solicitor-General.

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